85-1890

NO.

Supreme Court, U.S.
FILED
MAY 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1985

GARLAND INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants

v.

TEXAS STATE TEACHERS ASSOCIATION, ET AL.,

Appellees

On Appeal From The United States Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

LAW OFFICES OF EARL LUNA, P.C.
EARL LUNA, Counsel of Record
ROBERT E. LUNA
ROBERT T. MILLER, JR.
MARY MILFORD
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 720-2040

Attorneys For Appellants

QUESTIONS PRESENTED

1. Whether a school district regulation which prohibits teachers, acting on behalf of an employee organization,* from using the teacher mailboxes and bulletin boards for recruiting members or conducting business on behalf of the employee organization violates the First Amendment to the Constitution of the United States.

2. Whether a school district regulation which prohibits teachers, acting on behalf of an employee organization,* from recruiting members or conducting business on behalf of the employee organization on school premises during school hours violates the First Amendment to the Constitution of the United States.

3. Whether a school district regulation may be held unconstitutional, as applied, on the basis of how it could conceivably be interpreted and applied, but is not being so interpreted or applied by the school district.

* Employee organizations are those whose main purpose is to represent a group of employees on matters of employment practices and procedures.

LIST OF PARTIES

Appellants:

Garland Independent School District (GISD)
The members of the Board of Trustees, in their official capacities:
Harris Hill
Sydna Gordon (Successor to Donald Senter)
Mike Boyd (Successor to Cash Birdwell)
Randall Clark (Successor to Jim Burns)
Mike Cloud
Don Hollenshead
M. D. Williams, IV
Dr. Jill Shugart, in her capacity as Superintendent of Schools (Successor to Dr. Eli Douglas)

Attorneys for Appellants:

Law Offices of Earl Luna, P.C.
Earl Luna
Robert E. Luna
Robert T. Miller, Jr.
Mary Milford

Appellees:

Texas State Teachers Association (TSTA)
Garland Education Association (GEA)
Joe Atkins
Janice Hill

Attorneys for Appellees:

Bredhoff & Kaiser
Robert H. Chanin
Jeremiah A. Collins

Karen L. Johnson

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions	
U.S. Constitution, Amendment I	4
Garland Independent School District Statement of Policy 412	4
Garland Independent School District Administrative Regulation 412	5
Statement of the Case	7
The Question is Substantial	11
Conclusion	19
Certificate of Service	20
Appendix	
Unpublished Memorandum Opinion and Order of the United States District Court for the Northern District of Texas, Dallas Division. *Texas State Teachers Association, Garland Education Association, Joe Atkins and Janice Hill v. Garland Independent School District, et al.*, No. 3-81-0412-R (N.D. Tex. August 24, 1984)	A-1
Opinion of the United States Court of Appeals for the Fifth Circuit in *Texas State Teachers Association, Garland Education Association, Joe Atkins and Janice Hill v. Garland Independent School District, et al.*, 777 F.2d 1046 (5th Cir. 1985)	B-1
Order of the United States Court of Appeals for the Fifth Circuit dated February 21, 1986, denying the Petition for Rehearing and the Suggestion for Rehearing En Banc	C-1

TABLE OF CONTENTS — (Continued)

	Page
Mandate of the United States Court of Appeals for the Fifth Circuit issued on March 3, 1986	D-1
Order of the United States Court of Appeals for the Fifth Circuit dated March 26, 1986, denying Appellees' Motion to Recall and Stay the Mandate	E-1
Notice of Appeal to the Supreme Court of the United States filed on May 1, 1986	F-1
Texas Attorney General Opinion MW-89	G-1

TABLE OF AUTHORITIES

Cases	Page
Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242 (1966)	15
Anderson v. City of Bessemer City, N.C., ___ U.S. ___, 105 S.Ct. 1504 (1985)	9
Board of Education v. McCluskey, 458 U.S. 966, 102 S.Ct. 3469 (1982)	16
Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908 (1973)	10
Connecticut State Federation of Teachers v. Board of Education Members, 538 F.2d 471 (2nd Cir. 1976)	17
Connick v. Myers, 461 U.S. 137, 103 S.Ct. 1684 (1983)	17, 18, 19
Daniels v. Williams, ___ U.S. ___, 106 S.Ct. 662 (1986)	16
Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985)	9
Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211 (1976)	15
John v. State of La. (Bd. of T. for State C. and U.), 757 F.2d 698 (5th Cir. 1985)	9
Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 103 S.Ct. 948 (1983)	passim
Texas State Teachers Assn. v. Garland Independent School District, 777 F.2d 1046 (5th Cir. 1985)	2
Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969)	17
U.S. Postal Service v. Council of Greenburgh, Etc., 453 U.S. 114, 101 S.Ct. 2676 (1981)	11, 15
Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975)	16
Ysleta Federation of Teachers v. Ysleta Independent School District, 720 F.2d 1429 (5th Cir. 1983)	12

TABLE OF AUTHORITIES — (Continued)

Constitution	Page
U.S. CONST. amend I	passim
U.S. CONST. amend XIV	3, 18
TEX. CONST. art. VII, §1	7
Statutes	
28 U.S.C. §1254	4
28 U.S.C. §1331	3
28 U.S.C. §1343	3
28 U.S.C. §2201	3
28 U.S.C. §2202	3
42 U.S.C. §1983	2
TEX. EDUC. CODE ANN. §23.26(d) (Vernon 1972)	7
TEX. EDUC. CODE ANN. §21.904 (Vernon 1972)	5, 12
Regulations and Policies	
Garland Independent School District Administrative Regulation 412	passim
Garland Independent School District Policy 412	4, 7

No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1985

GARLAND INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants

v.

TEXAS STATE TEACHERS ASSOCIATION, ET AL.,

Appellees

On Appeal From The United States Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

The Garland Independent School District, its Board of Trustees and its Superintendent in their official capacities, Appellants herein, appeal from that portion of the judgment of the United States Court of Appeals for the Fifth Circuit, dated December 6, 1985, holding unconstitutional, as violative of the First Amendment, those parts of the Garland Independent School District's Administrative Regulation 412 which prohibit teachers, acting on behalf of an employee organization whose main purpose is to represent a group of employees in matters of employment practices and procedures, from recruiting members or conducting business on

behalf of the employee organization on school premises during school hours and from using the school media facilities, such as the teacher mailboxes and bulletin boards, for such purposes.

OPINIONS BELOW

The United States District Court for the Northern District of Texas, Dallas Division, filed its unpublished Memorandum Opinion and Order on August 24, 1984, which is reprinted in Appendix A. (Rec. p. 373).[1]

The opinion of the United States Court of Appeals for the Fifth Circuit, filed December 6, 1985, reported at 777 F.2d 1046, is reprinted in Appendix B. The order of the United States Court of Appeals for the Fifth Circuit, issued February 21, 1986, denying Petition for Rehearing and Suggestion for Rehearing En Banc, is reprinted in Appendix C. The mandate was issued on March 3, 1986, and is reprinted in Appendix D. The order denying Appellants' Motion for Stay of Enforcement and/or Recall of Mandate, issued March 26, 1986, is reprinted in Appendix E. Appellants filed a Notice of Appeal on May 1, 1986, which is reprinted in Appendix F.

JURISDICTION

This action was brought pursuant to 42 U.S.C. §1983 seeking damages and declaratory and injunctive relief on the basis that the Garland Independent School District's Administrative Regulation 412, as written and as applied,

---

[1]The record in this case consists of four volumes of pleadings and orders and eighteen volumes of depositions. Two of the volumes of pleadings and orders have been paginated consecutively and will be cited as "Rec. p. ". The other two volumes of pleadings and orders have been labeled as "P", which contains only Defendants' Motion for Summary Judgment, and "Q", which contains only Defendants' Brief in Response to Plaintiffs' Motion for Partial Summary Judgment; these volumes will be cited as "Rec. P, p. " and "Rec. Q, p. ". The deposition transcripts are labeled "A" through "O" and "R" through "T", and will be cited by reference to those labels as well as by reference to the deponent's name, such as "Rec. L, p. — Douglas".

was repugnant to the First and Fourteenth Amendments to the United States Constitution. Federal jurisdiction was invoked pursuant to 28 U.S.C. §§1331, 1343(3) and 28 U.S.C. §§2201, 2202.

The federal constitutional question was raised at the inception of the suit in the pleadings and has continuously been raised on appeal. The respective parties filed a Motion for Summary Judgment, and the District Court, on August 24, 1984, denied Plaintiffs/Appellees' Motion for Summary Judgment and granted Defendants/Appellants' Motion for Summary Judgment upholding the constitutionality of Administrative Regulation 412, with a minor exception not germane to this appeal.[2] (Rec. p. 373, App. A).

Plaintiffs appealed the District Court decision. The Court of Appeals for the Fifth Circuit, on December 6, 1985, affirmed that part of the summary judgment upholding Administrative Regulation 412's prohibition against visitation and use of school media facilities by outside employee organization[3] representatives during school hours and reversed that part of the summary judgment which upholds Administrative Regulation 412's prohibition against the teachers, acting on behalf of an employee organization, recruiting members, conducting business on behalf of the employee organization on school premises during school hours, or using the school media facilities for such purposes. The Court of Appeals found the School District's application of Administrative Regulation 412 to be repugnant to the First Amendment of the Constitution. (App. B-18).

---

[2]The District Court held the first sentence of subsection 4 and the second sentence of subsection 5 of Administrative Regulation 412 which provide for prior clearance from the principal for use of school facilities before or after school hours to be unconstitutionally vague and overbroad.

[3]Administrative Regulation 412 defines "employee organizations" as any organization whose main purpose is to represent a group of employees in matters of employment practices and procedures.

A timely Motion for Rehearing and Suggestion for Rehearing En Banc were filed by Appellants on December 20, 1985, and overruled by the Court of Appeals on February 21, 1986. (App. C). Notice of Appeal to this Court was timely filed in the Court of Appeals for the Fifth Circuit on May 1, 1986. (App. F). This appeal is being docketed in this Court within ninety (90) days from the denial of rehearing below.

The jurisdiction of the U.S. Supreme Court to review the decision of the Court of Appeals for the Fifth Circuit on appeal is conferred by 28 U.S.C. §1254(2). Administrative Regulation 412 is a State statute within the meaning of 28 U.S.C. §1254(2) and this Court has jurisdiction to review the judgment on appeal in this case which holds Administrative Regulation 412 to be unconstitutional. See *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 42, 103 S.Ct. 948, 953 (1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Garland Independent School District Statement of Policy 412:

RE: Professional Freedoms and Individual Rights

The Garland Independent School District, its Board of Trustees, the Superintendent, assistant superintendents, principals, other administrators, and supervisors shall not directly or indirectly require, coerce, or unduly influence any employee of the District as respects:

1. joining, or not joining, any group, club, committee, organization, or association; or

2. participating in, or refraining from participating in, political affairs in the community, state or nation.

No District funds, vehicles, facilities (during scheduled school time or employee working time) shall be used in any manner in political activities; however, this policy does not prohibit the use of school facilities as voting places for elections during scheduled school time.

It shall be the responsibility of the Superintendent to cause each employee of the District to be notified of the provisions of this policy.

Garland Independent School District
Administrative Regulation 412:

RE: Professional Freedoms and Individual Rights

The Garland Independent School District, its Board of Trustees, the Superintendent, assistant superintendents, principals, other administrators, and supervisors shall not directly or indirectly require, coerce, or unduly influence any employee of the District as respects:

1. joining, or not joining, any group, club, committee, organization, or association; or

2. participating in, or refraining from participating in, political affairs in the community, state, and nation.

No District funds, vehicles, facilities (during scheduled school time or employee working time) shall be used in any manner in political activities; however, this policy does not prohibit the use of school facilities as voting places for elections during scheduled school time.

Employee membership in any organizations* will be consistent with Article 21.904 of the Texas Education Code. Accordingly, the following procedures will be observed:

1. Employee membership in any organization is a matter of free choice.

2. The central and local school administration position is neutral. It neither encourages nor discourages membership in any employee organization.

3. Faculty meetings called and conducted by the principal are for school-related matters. An employee organization matter shall not be part of the agenda.

4. Organizational meetings of local building members before or after school hours may be held in school facilities upon request to and approval by the local school principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.

5. Group meetings or individual conferences conducted by elected officials of any employee organization for purposes of membership recruitment or any other matter of business, shall not be conducted on school premises during school hours. School facilities may be used for such purposes before or after school hours upon request to and approval by the local principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.

6. The school mail service shall not be used by any employee organization.

7. Distribution of material directly in mailboxes at the school is prohibited.

8. The use of school district equipment and supplies by any employee organization is prohibited.

9. The public address system is for school business only. Association announcements should not be made on school equipment.

* Employee organization is defined as any organization whose main purpose is to represent a group of employees in matters of employment practices and procedures.

STATEMENT OF THE CASE

The Appellant, Garland Independent School District (hereinafter referred to as GISD) is an independent school district organized pursuant to the laws of the State of Texas for the purpose of operating a system of public schools. (Rec. p. 192 — Stipulation 8). It employs approximately 1,700 teachers at 46 schools, and enrolls approximately 30,500 students from kindergarten through the twelfth grade. (Rec. pp. 193, 202 — Stipulations 14, 15). The GISD Superintendent of Schools and the members of the Board of Trustees, in their official capacities, are also Appellants.

Appellee, Texas State Teachers Association (hereinafter referred to as TSTA) is a state-wide employee organization and the Garland Education Association (hereinafter referred to as GEA) is a local affiliate of TSTA. Both TSTA and GEA are employee organizations within the meaning of Administrative Regulation 412 and each has, among its members, persons employed as teachers and administrators by the GISD. Appellee Joe Atkins is an employee and representative of TSTA. Appellee Janice Hill is a member of TSTA, an elected official of GEA, and she is also employed as a teacher by the GISD. (Rec. pp. 191, 192 — Stipulations 1-7).

GISD adopted a Statement of Policy 412, Re: Professional Freedoms and Individuals Rights, and a supporting Administrative Regulation 412, Re: Professional Freedoms and Individual Rights.[4] (Rec. pp. 194, 197, 199 — Stipulations 18-20, 28, 40).

---

[4]These were adopted under Article VII, section 1 of the Texas State Constitution and section 23.26(d) of the Texas Education Code which provides that "the trustees may adopt such rules, regulations, and by-laws as they may deem proper". (Rec. p. 195 — Stipulation 21; Rec. p. 374, App. A-2).

On January 8 and 9, 1981, nine TSTA representatives, acting alone or in pairs, visited numerous GISD schools during school hours[5] and were refused permission, by the school officials pursuant to Administrative Regulation 412, to distribute their literature or to meet with GISD teachers or the TSTA faculty representative. (Rec. p. 375, App. A-3, B-6). Janice Hill, a GISD teacher who is an elected official of GEA, was refused permission to use the school mailboxes to distribute the organization's information and notices. (Rec. B, pp. 10, 11 — Hill). These are the sole controversies between the parties. This lawsuit resulted, challenging the constitutionality of the School District's actions and Administrative Regulation 412.

The District Court upheld the constitutionality of Administrative Regulation 412, both as written and as applied, with the minor exception previously noted. In regard to the manner in which the regulation is applied, the court made specific findings that GISD interprets and applies Administrative Regulation 412 to prohibit only "meetings during school hours concerning *some type of TSTA business*" and "teachers from *promoting* an employee organization or *working* for the organization during school hours". (Rec. p. 379 n. 13, App. A-6; Rec. p. 380 n. 15, App. A-8). While GISD does interpret the term "elected official" as any representative of an employee organization, whether elected or not, and thus includes teachers who are not elected representatives within the scope of the regulation, the Court found that the record before it established that GISD focuses on whether that person is acting in his or her official capacity on behalf of the employee organization and is seeking to discuss some type

---

[5]"School hours" include the entire period between 8:00 a.m. and 3:45 p.m. of each day except for days when school may be let out early. (Rec. p. 196 — Stipulation 22).

of TSTA *business*. (Rec. p. 380 n. 14, App. A-7). Any school official's individual departure from this interpretation is not enforced by GISD. (Rec. p. 379 n. 13, App. A-6).

Plaintiffs appealed the District Court decision. The Fifth Circuit affirmed the District Court's decision upholding Administrative Regulation 412's prohibition against visitation and use of school media facilities, such as the teacher mailboxes and bulletin boards, by outside employee organization representatives during school hours; but reversed that part of the decision upholding Administrative Regulation 412's application to the teachers, their communications and use of the mailboxes and bulletin boards for employee organization business. (App. B-19).

To reach its decision, the Fifth Circuit first conducted an evidentiary review[6] of GISD's interpretation and application of Administrative Regulation 412 and disagreed with the District Court's findings in this regard. (App. B-15). While the District Court correctly found from the overall record that GISD interpreted its regulation based on whether the teacher was acting on behalf of an employee organization and was seeking to discuss some type of business on behalf

---

[6]The Fifth Circuit applied a true summary judgment standard of review and looked at the evidence in the light most favorable to appellees. (App. B-9). However, the evidence before the district court consisted of a fact Stipulation (Rec. p. 190) and eighteen depositions from which the district court obviously resolved fact issues and made findings thereon, as opposed to determining that there were no fact issues presented; and, therefore the submission of the case on cross-motions for summary judgment is equivalent to a trial on stipulated facts. Under these circumstances the Fifth Circuit should have reviewed the evidence under the "clearly erroneous" standard even if all the evidence was documentary. *Anderson v. City of Bessemer City, N.C.*, ___ U.S. ___, 105 S.Ct. 1504, 1512 (1985); *John v. State of La. (Bd. of T. for State C. and U.)*, 757 F.2d 698, 703 (5th Cir. 1985); *Fritiofson v. Alexander*, 772 F.2d 1225, 1240 (5th Cir. 1985).

of the organization, the Fifth Circuit grasped isolated and out of context deposition statements answering hypothetical questions to reach a different conclusion as to how GISD applied or *"might"* apply its regulation. (App. B-16).

There was no factual challenge before the District Court by any person alleging that he or she had been subjected to the Fifth Circuit's interpretation of the regulation. The decision was rendered wholly in the abstract and thus contrary to the fundamentals of constitutional adjudication:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.
>
> * * *
>
> These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.

Broadrick v. Oklahoma, 413 U.S. 601, 611-12, 93 S.Ct. 2908, 2915 (1973).

Having improperly found ways in which GISD *"might"* interpret the regulation in an unconstitutional manner, the Fifth Circuit held the GISD's Administrative Regulation 412 to be unconstitutional in regard to its application to teacher communications. The Fifth Circuit also held the prohibition against the teachers' use of the mailboxes and bulletin boards for employee organization business to be unconstitutional because teachers may use these facilities "to communicate with each other on any subject, including purely personal matters." (App. B-18).

THE QUESTION IS SUBSTANTIAL

At the inception of its opinion, the Fifth Circuit pays lip service to this Court's decision in *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948 (1983), and then proceeds to eviscerate the *Perry* decision by, in effect, holding that the school's internal mail system is open to any and all, for any and all purposes, so long as the material is given to a teacher to distribute. The panel decision completely subverts the concept of a non-public forum and its permissible attendant restrictions for First Amendment purposes.

The District Court found and the panel agreed that, like *Perry*, the primary purpose of GISD's internal mail system is to distribute *official messages* between school administrators and teachers and among the teachers themselves. (Rec. K, p. 28 - White); (Rec. pp. 383, 389, App. A-10, 16, B-18). Both the District Court and the Fifth Circuit agree that GISD's mailboxes and bulletin boards are non-public fora. (Rec. p. 385, App. A-12, B-13). As such, the GISD may, "without further justification", restrict use of the fora to official school business only, or it may make distinctions in access on the basis of *subject matter* and *speaker* identity. *Perry, supra*, 460 U.S. at 49, 55, 103 S.Ct. at 957, 959.

There are two criteria by which the constitutionality of access distinctions are to be evaluated. The access distinction must be reasonable in light of the purpose which the forum at issue serves and must not be an effort to suppress expression merely because public officials oppose the speaker's view. *Perry, supra,* 460 U.S. at 46, 49, 103 S.Ct. at 955, 957; *U.S. Postal Service v. Council of Greenburgh, Etc.*, 453 U.S. 114, 101 S.Ct. 2676 (1981).

GISD has chosen to limit access to the mail system to school business and to selected community and civic groups

which are related to the school's functions. (Rec. pp. 383, 389 App. A-10, 16). Administrative Regulation 412(6) prohibits access to the mail system by an employee organization and section 7 of the regulation prohibits distribution of employee organization material directly in the mailboxes. *All* employee organization material is prohibited, therefore, TSTA has no claim of access to a limited public forum since no similar entity has such access. (App. B-12). Such a prohibition is constitutionally permissible as the Fifth Circuit has previously stated in *Ysleta Federation of Teachers v. Ysleta Independent School Dist.*, 720 F.2d. 1429, 1433 (5th Cir. 1983).

The school's motivation for such a prohibition is based on the statutory mandate found in the Texas Education Code Sec. 21.904 (Vernon 1972):

> (a) No school district, board of education, superintendent, principal, or other administrator benefiting by the funds provided for in this code shall directly or indirectly require or coerce any teacher to join any group, club, committee, organization, or association.

Whether the argument that Administrative Regulation 412 is necessary in order to comply with this Education Code requirement is correct, or without merit as the panel states, is immaterial since the motivation was to comply and establish a facially neutral policy rather than opposition to the speaker's viewpoint. Several administrators are members of TSTA and GEA. (Rec. L, p. 29 - Douglas).

The Fifth Circuit agreed that GISD may prohibit an outside member of an employee organization from distributing material in the mailboxes but would allow the same materials to be distributed by the teacher, thereby ignoring the *Perry* decision that GISD may regulate access on the basis

of subject matter. Not only does the panel decision circumvent this Court's decision in *Perry*; it also destroys the entire concept of a non-public forum. It allows teachers, on a unilateral basis, to convert the school mail system to a public forum and to use the system to service whatever cause the teacher may decide to put forth, whether it is educationally related or not. If a teacher is allowed to place TSTA or GEA materials in the mailboxes, then any other employee organization is in a position to demand equal access. Access by other employee organizations could be achieved by distribution from a friendly teacher within the school; but if such a teacher were not available, the employee organization would be in a position to demand direct access since access has been given to similar entities. Hence, it is no longer within the school district's power to determine that the mail system is a non-public forum.

Other unions active at GISD which would also demand mail system access are the Association of Texas Professional Educators and the American Federation of Teachers. (Rec. B, p. 40, 41 - Hill). There is no doubt that direct access through a teacher would be utilized by these groups. In her deposition, Janice Hill, the GEA teacher representative at GISD, detailed an incident that occurred at the beginning of the school year regarding the Association of Texas Professional Educators, which read Administrative Regulation 412's prohibition against an *"elected official"* recruiting on campus and then attempted to give their distribution materials to a teacher member to distribute, rather than to an elected official.[7] (Rec. B, p. 58 - Hill).

---

[7]Testimony by Janice Hill in her deposition at page 58, 60:

> A. They said. And they said that because it states that this would be by elected officials that you could get anybody that was not an official elected to pass out the information.

Perry's suggestion that too many demands for equal access to the mail system "would invite schools to close their mail systems to all but school personnel" is not a solution to the problem since it is the school's own teacher personnel that would cause the problem. Since control of the mail system is effectively placed solely in the hands of the teachers by the panel's decision, the only solution is to close the mail system entirely, which is unacceptable since it would cripple the school's communication system. Faced with this unacceptable alternative, the school will have no choice but to service the "public forum" its teachers will have created as a result of the panel decision, which is a function wholly unrelated to the school's purpose of education. This concept is completely contrary to this Court's often stated maxim that:

> [T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

Q. Now what organization is that and who is it we are talking —

A. Association of Texas Professional Educators.

Q. All right. And what person in that professional educators — Association of Professional Educators did what you are just telling me?

A. Tom Wyler.

Q. Tom who?

A. Wyler.

Q. Is he in your school?

A. Yes. He is the representative for ATPE.

Q. So he was passing out material?

A. No, he was not. He had a member of ATPE because he said he knew about this elected official business.

Q. Who was it that was passing it out?

A. Charles Picher [Member of ATPE].

* * * * *

Q. He didn't tell you though that he had gotten permission from the administration to hand out his material did he? Or did he?

A. No, he didn't get permission.

Perry, supra, 460 U.S. at 46, 103 S.Ct. at 955, quoting *U.S. Postal Service, supra*, 453 U.S. at 129-130, 101 S.Ct. at 2684, in turn quoting *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 1216 (1976), in turn quoting *Adderley v. Florida*, 385 U.S. 39, 47, 87 S.Ct. 242, 247 (1966).

The question as to whether there is a First Amendment violation when a school district regulation which prohibits teachers, acting on behalf of an employee organization, from recruiting members or conducting business on behalf of the employee organization on school premises during school hours is likewise a novel and substantial one.

The District Court made a factual determination that Administrative Regulation 412 "prohibits only meetings during school hours concerning some type of TSTA business", but rejected the Appellees' argument that the regulation in question prohibits those meetings or conferences on any subject or topic whatsoever relating in anyway to TSTA or to any other employee organization. (Rec. p. 380, n. 14, App. A-7). The District Court based this factual determination on the summary judgment record which includes the following sworn testimony of Dr. Eli Douglas, former Superintendent of Schools of the GISD:

> Q. Do you have a policy or practice in the school district which prohibits two teachers who are sitting in the workroom drinking coffee which prohibits them from discussing TSTA?
>
> A. No.
>
> Q. Are they free to do that?
>
> A. Sure.
>
> Q. Does it matter whether they are members or nonmembers?
>
> A. Doesn't matter.

Q. Do you have a policy that prohibits two teachers at lunch from talking about TSTA?

A. No.

Q. Do you have — and that doesn't matter whether they are members or nonmembers?

A. Correct.

Q. Do you have a policy that prohibits one teacher going into another teacher's room during the conference period when they both have a conference period and exchanging remarks about TSTA for five minutes?

A. We have no procedure nor policy that prohibits that.

Q. Again just be subject to reasonable practices I assume?

A. Yes.

(Rec. L, p. 45 — Douglas.). The then Superintendent's interpretation of Administrative Regulation 412 clearly indicates the narrow scope of what the GISD is seeking to limit in terms of employee speech.

This Court has reaffirmed its holding in *Wood v. Strickland*, 420 U.S. 308, 325, 95 S.Ct. 992, 1002 (1975), in *Board of Education v. McCluskey*, 458 U.S. 966, 970, 102 S.Ct. 3469, 3471 (1982), that a Court of Appeals is "ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement." The Court continued by stating that "§1983 does not extend the right to relitigate in federal court . . . *the proper construction of school regulations*." *Wood, supra*, 420 U.S. at 326, 95 S.Ct. at 1003, and *McCluskey, supra*. The Fifth Circuit's interpretation of the regulation and its decision tend "not only to trivialize, but grossly to distort the meaning and intent of the Constitution." *Daniels v. Williams*, ____ U.S. ____, 106 S.Ct. 662, 665 (1986).

Unless this Court reverses that part of the decision of the Fifth Circuit which reversed the District Court's judgment, the panel's decision below will stand as a harbinger of unnecessary and unwarranted judicial interference in school regulations and the ability of school administrators and board members to interpret their own regulations.

The timely resolution of this issue is a vital one to all school districts, their administrators and board members as it is to the Garland Independent School District, its administrators and board members.

Teachers, of course, are entitled to First Amendment protection as are other citizens. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736 (1969). However, "teachers' exercise of First Amendment rights in the schools is subject to reasonable regulation." *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471, 478 (2nd Cir. 1976). The threshold inquiry surrounding the Appellees' First Amendment claim is whether the teacher's speech and speech-related conduct involved matters of "public concern".

This Court has stated that

> [w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Connick v. Myers, 461 U.S. 137, 146, 103 S.Ct. 1684, 1690 (1983). The Court went on to hold

> that when a public employee speaks not as a citizen upon matters of public concern, but instead as an

> employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. 461 U.S. at 147. Even in those situations where the employee's speech has a limited impact on matters of public concern, the speech will not necessarily fall within the protection of the First and Fourteenth Amendments. *Id.* 461 U.S. at 154, 103 S.Ct. at 1693-94.

Whether a teacher's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. See *Id.* 461 U.S. at 147, 103 S.Ct. at 1690. The District Court in the case at bar determined that the record indicated that consistent with Texas Attorney General Opinion MW-89, which is reprinted in Appendix G, school officials could prohibit teachers from promoting an employee organization or working for that organization during school hours. (Rec. p. 379, n. 13, App. A-6). The rationale for the Attorney General's Opinion was based on the fact that allowing teachers to perform employee organization business on a release time basis would constitute an unconditional grant of public funds to a private organization and would therefore be unconstitutional. In sum, Administrative Regulation 412 does not infringe on Appellees' First Amendment rights. Thus, the teachers' promotion of and working for an employee organization during school hours is not a matter of "public concern." After examining this form of expression by the teacher, the District Court decided that enforcement of Administrative Regulation 412 is constitutional. (Rec. p. 379, n. 13, App. A-6).

The Fifth Circuit was equally erroneous in its reasoning, holding the Regulation unconstitutional because Appellees

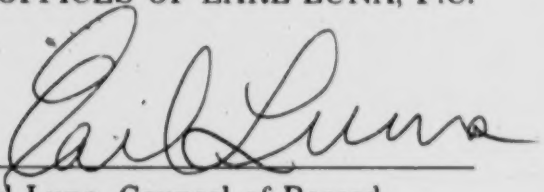
have not demonstrated that the teacher communications would result in "material and substantial interference with the activity or discipline of the School." (App. B-18). Both *Connick, supra*, and *Perry, supra*, have made it clear that in non-public fora situations, such as the one at issue, it is not necessary to prove present or future disruption to justify denial of access to the non-public fora. *Connick*, 461 U.S. at 152, 103 S.Ct. at 1692-93; *Perry*, 460 U.S. at 52, 103 S.Ct. at 958.

The lower court's refusal to distinguish the Appellees' speech involving "private concerns" from speech involving "public concerns" as well as the potential negative impact on the interpretative authority of school boards, administrators and trustees is erroneous as to call for correction by this Court.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal and summarily reverse that part of the Fifth Circuit's decision which reversed the District Court's judgment or in the alternative this appeal should be accorded plenary review.

Respectfully submitted,
LAW OFFICES OF EARL LUNA, P.C.

By: 

Earl Luna, Counsel of Record
Robert E. Luna
Robert T. Miller, Jr.
Mary Milford
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 720-2040

CERTIFICATE OF SERVICE

I, Earl Luna, counsel of record for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of the Jurisdictional Statement on all parties required to be served, by depositing three copies of the Jurisdictional Statement in the United States mail, on the 16th day of May, 1986, with first-class postage prepaid, addressed to the following counsel of record for Appellees at the address indicated, to-wit: Bredhoff & Kaiser, Mr. Robert H. Chanin, Mr. Jeremiah A. Collins, 1000 Connecticut Ave. N.W., Washington, D.C. 20036, and Ms. Karen L. Johnson, Attorney at Law, General Counsel, Texas State Teachers Assoc., 316 West Twelfth Street, Austin, Texas 78701.

Earl Luna

Earl Luna
Counsel of Record for Appellants

APPENDIX

m
U.S. District Court
Northern District of Texas
F I L E D
Aug 24 1984
Nancy Hall Doherty, Clerk
By PG
Deputy
D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

TEXAS STATE TEACHERS ASSOCIATION, GARLAND EDUCATION ASSOCIATION, JOE ATKINS AND JANICE HILL,

Plaintiffs,

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, et al.

Defendants.

CIVIL ACTION NO. 3-81-0412-R

MEMORANDUM OPINION AND ORDER

The Garland Independent School District ("GISD") totally prohibits "employee organizations"[1] — such as the Texas State Teachers Association — from using the school mail system, the bulletin boards and the public address system. It also prohibits representatives of employee organizations from recruiting or having any meetings with teachers on school premises during "school hours."[2] However, em-

[1]"Employee Organization is defined as any organization whose main purpose is to represent a group of employees in matters of employment practices and procedures." Both TSTA and GEA are employee organizations within the meaning of the GISD policies in question. Stipulation No. 5.

[2]The term "school hours" means "the entire period between 8:00 a.m. and 3:45 p.m. of each school day except for days when school may be let out early." Stipulation No. 22.

ployee organizations are not prevented from recruiting or meeting with teachers on school premises before 8:00 a.m. and after 3:45 p.m. "upon request and approval by the local school principal"[3] — and they may distribute literature on school premises (parking lots, hallways, etc.) or place material on teachers' desks during non-school hours.[4]

This case involves a constitutional challenge to these GISD policies — which were promulgated by the Garland Board of Trustees[5] and which are implemented by the various principals of GISD schools. The plaintiffs are the Texas State Teachers Association ("TSTA"), a voluntary employee organization with members employed as GISD teachers; the Garland Education Association ("GEA"), a TSTA local affiliate; Joe Atkins, a TSTA employee; and Janice Hill, a GEA member employed as a GISD teacher. The defendants are the Garland Independent School District; Harris Hill, Donald Senter, Cash Birdwell, Jim Burns, Mike Cloud, Don Hollenshead, and M. D. Williams, IV, in their official capacities as GISD Trustees; and Eli Douglas, in his official capacity as GISD Superintendent.

The parties have filed cross motions for summary judgment. There are no genuine issues of material fact. And, the legal issues have been settled — *and this Court's opinion is mandated* — by the 5-4 decision of the United States Su-

---

[3]Under the summary judgment record before this Court, there is no evidence that any GISD principal ever denied permission for TSTA (or any other employee organization) to use school premises *during non-school hours* for recruiting, meetings, or distribution of literature. See footnote 11.

[4]Employee organizations may also contact the GISD teachers at school through the United States mail, or they may contact them at home either by mail or phone. Indeed, GISD will furnish any employee organization with the name, home address, and phone number of each GISD teacher so home contacts can be made.

[5]The challenged policies were adopted under Article VII, section 1 of the Texas State Constitution and section 23.26(d) of the Texas Education Code. Section 23.26(d) provides: "The trustees [of an independent school district] may adopt such rules, regulations, and by-laws as they may deem proper."

preme Court in *Perry Education Assn. v. Perry Local Educators' Assn.*, 103 S. Ct. 948 (1983) (summary judgment rejection of constitutional challenge to school policies prohibiting access to interschool mail system and teacher mailboxes). Accordingly, with one minor exception, the constitutional challenge is rejected, the plaintiffs' motion for summary judgment is DENIED, and the defendants' motion for summary judgment is GRANTED.

The Challenge

On January 8 and 9, 1981, nine TSTA representatives, acting alone or in pairs, visited numerous GISD elementary, junior high, and high schools during school hours.[6] Relying on GISD Administrative Regulation 412, the principal or assistant principal at most schools refused to permit the TSTA representatives to distribute their literature or to meet with GISD teachers or the TSTA faculty representative.[7] At some schools, however, either the school principal or the school secretary — contrary to the GISD policies — granted the requests of the TSTA representatives.[8]

---

[6]The plaintiffs assert that the primary purpose of these visits was to discuss the proposed new certification standards for Texas public school teachers. The defendants contest this, and claim that the primary purpose of the visits was to challenge the policies involved in this lawsuit. *The "real" purpose of these visits is not relevant to the disposition of the legal issues in this case* — since the GISD policies prohibit all meetings between TSTA representatives and teachers during school hours. See footnotes 7, 12, 13, 14.

[7]On each school campus, teachers who are TSTA members select one teacher-member to represent them.

[8]The deposition testimony establishes that, at two schools (Hillside and Rowlett), the principals permitted TSTA representatives to meet with the teachers during school hours. *See* Wall Dep. at 13; Dorsett Dep. at 15-16. On other occasions, the TSTA representatives obtained permission from the school secretary to meet with the faculty — although, on one such instance, the school principal went to the lunchroom and told the TSTA representatives that they had to leave after lunch because they were violating school policy. Wall Dep. at 12. In the past, certain principals have been reprimanded for allowing materials to be distributed or items to be sold in violation of Board policy. Douglas Dep. at 54; Nix Dep. at 102.

This lawsuit resulted. By it, the plaintiffs challenge the constitutionality of the GISD policies and practices which deny them access to GISD teachers.[9] In substance, the challenged policies prohibit all employee organizations from:

> (i) recruiting, organizing or discussing any other business with GISD teachers, whether TSTA members or not, on school premises during school hours;
>
> (ii) placing literature in the teacher mailboxes or using the school's internal mail service;
>
> (iii) using the bulletin boards or posting announcements or other materials anywhere on school premises;[10] and
>
> (iv) having any announcement read over the school public address system.

Specifically, the plaintiffs claim that these policies violate their First Amendment rights of free speech and free association — and are unconstitutionally vague and overbroad because they vest unfettered enforcement discretion in school administrators without providing sufficiently explicit guidelines. Further, the plaintiffs contend that school officials have granted access to other commercial and civic

---

[9]Only Policy Statement and Administrative Regulation 412 apply to employee organizations. Accordingly, the plaintiffs have standing to challenge only those two policies. Other policies, however, are relevant to their equal protection claims including: Policy Statements 425, 426, 535, 804, 804.1, 804.2, 807, and 808; and Administrative Regulations 425, 426, 535, 804.1, and 804.2. Also, Policy Statement 106.4 relates to the plaintiffs' due process claim. The Appendix to the parties' Stipulations, filed on December 14, 1982, contains a complete copy of each of these policies.

[10]The plaintiffs contend that there is no written GISD policy which specifically prohibits employee organizations from posting and/or distributing written material on school premises during school hours. School officials, however, have interpreted Adm. Reg. 412(8) to include bulletin boards — since that regulation prohibits employee organizations from using school district equipment or supplies. *See* Douglas Dep. at 20; Richey Dep. at 40. Other school officials rely on the general policy of neutrality (Texas Education Code § 21.904) to justify the prohibition against posting employee organization literature.

organizations during school hours in violation of the plaintiffs' rights to equal protection — and that GISD has violated their due process rights by failing to provide an administrative process to review enforcement decisions made by school administrators concerning these policies.

The defendants deny that these policies, either on their face or as applied, violate the plaintiffs' First or Fourteenth Amendment rights. They maintain that the GISD schools are not public fora — that, therefore, TSTA members are not entitled to exercise their First Amendment rights "whenever and however they choose" — and that, instead, those rights are subject to the reasonable time, place, and manner regulations promulgated by the GISD Board of Trustees. Further, the defendants contend that reasonable alternative methods of communication exist because TSTA members may communicate with faculty members by meeting with them on school premises before 8:00 a.m. and after 3:45 p.m.; by distributing literature in the parking lots or hallways or placing it on teachers' desks before 8:00 a.m. and after 3:45 p.m.;[11] and by contacting teachers at school or home through the United States Postal Service. Finally, with regard to use of the internal mail system, teacher mail-

---

[11]The plaintiffs claim that these are not "reasonable alternative" avenues of access because teachers *ordinarily* do not report to their classrooms until 8:00 a.m., they leave promptly at 3:45 p.m., and because the outside school doors are locked at 3:30 p.m. every day. Brank Dep. at 51-52; White Dep. at 15. Morever, they claim that if a teacher's classroom door is locked prior to 8:00 a.m., school officials will not unlock it to allow TSTA representatives to place literature on the teacher's desk. Douglas Dep. at 77-78. Disputing these assertions, the defendants cite deposition testimony which establishes that school officials will in fact allow TSTA representatives to stand in the hallways or parking lots to hand out literature both before and after school hours; that at least one principal would unlock the outside doors for TSTA representatives to come in during non-school hours, and that, if classroom doors are locked, TSTA representatives may slip literature under the door. White Dep. at 21; Brank Dep. at 52-53; Douglas Dep. at 78-79.

If any school officials were to interpret the challenged policies in such a manner as to deny access to employee organization representatives during non-school hours, this would be directly contrary to stated Board policy. The Board policies do allow reasonable alternative access during non-

boxes, public address system, and bulletin boards, GISD asserts that allowing an employee organization to use those means of communication "would not promote the learning process" — and that it would be contrary to Texas Education Code § 21.904, which requires the school district to maintain a position of neutrality with respect to employee membership in various organizations.[12]

Interpretation and Application of Adm. Reg. 412

Administration Regulation 412 absolutely prohibits representatives of employee organizations from recruiting, organizing, or meeting with GISD teachers on school grounds during school hours.[13] In addition, it denies employee organ-

---

school hours, and thus are constitutional. Moreover, even if teachers *normally* arrive just prior to 8:00 a.m. and depart promptly at 3:45 p.m., TSTA representatives may ask teachers to arrive early or stay late. The Board is not responsible for the refusal of any teacher to meet with a TSTA representative during non-school hours.

[12]Section 21.904 provides that "No school district, board of education, superintendent, assistant superintendent, principal, or other administrator benefitting by the funds provided for in this code shall directly or indirectly require or coerce any teacher to join any group, club, committee, organization, or association. ..."

[13]In addition, the plaintiffs contend that several school officials have interpreted Adm. Reg. 412(5) to prohibit teachers from discussing TSTA business among themselves on school premises during school hours. *See* Beavers Dep. at 7; Roden Dep. at 65-66; Douglas Dep. at 71; Hardy Dep. at 55-56; White Dep. at 35-38. *But see* Brank Dep. at 22; Richey Dep. at 50-54; Collins Dep. at 21-23. The deposition testimony establishes, however, that even if some school officials do interpret Adm. Reg. 412 in that manner, *there has not been any attempt to enforce such an interpretation.* *See* White Dep. at 69-70; Beavers Dep. at 54-55. Should school officials seek to prohibit teachers from discussing organizational business among themselves during non-class time, that action would be unconstitutional. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

On the other hand, the record does indicate that, consistent with Texas Atty. Gen. Op. MW 89, school officials would prohibit teachers from promoting an employee organization or working for that organization during school hours. In that opinion, the Texas Attorney General held that the Ft. Worth Independent School District was in error for allowing teachers to perform employee organization business on a "release time" basis. Allowing release time work "constitutes an unconditional grant of public funds to a private organization and is therefore unconstitutional." Enforcement of that policy is constitutional.

izations any access to the school's internal mail system, teacher mailboxes, bulletin boards, and public address system. Specifically, Adm. Reg. 412 provides:

"Relationships with employee organizations will be consistent with Article 21-904 of the Texas Education Code. Accordingly, the following procedures will be observed:

1. Employee membership in any organization is a matter of free choice.

2. The central and local school administration position is neutral. It neither encourages nor discourages membership in any employee organization.

3. Faculty meetings called and conducted by the principal are for school-related matters. An employee organization matter shall not be part of the agenda.

4. Organizational meetings of local building members before or after school hours may be held in school facilities upon request to and approval by the local school principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.

5. Group meetings or individual conferences conducted by an elected official[14] of any employee organization for pur-

---

[14]The plaintiffs assert that GISD officials have interpreted the term "elected official" to include any employee organization representative, whether or not elected. Plaintiffs' Undisputed Facts ¶ 14(b). Accordingly, they argue, that portion of Adm. Reg. 412(5) is vague and overbroad. The record does establish that GISD officials focus on whether the representative is acting in his or her official capacity and is seeking to discuss some type of TSTA business, instead of personal matters — and, if so, the school official apparently assumes that that representative is an "elected official" covered by Adm. Reg. 412(5). That interpretation is consistent and reasonable — because *the regulations clearly seek to prohibit recruiting, organizational activities, and meetings about any other business between employee organization representatives and teachers on school premises during school hours.* Accordingly, whether or not a representative was elected is not relevant to the legal issues in this case.

poses of membership recruitment or any other matter of business,[15] *shall not be conducted on school premises during school hours.* School facilities may be used for such purposes before or after school hours upon request to and approval by the local principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.

6. The school mail service shall not be used by any employee organization.

7. Distribution of material directly in mailboxes at the school is prohibited.[16]

8. The use of school district equipment and supplies by any employee organization is prohibited.

9. The public address system is for school business only. Association announcements shall not be made on school equipment."

By contrast, other Board policies give school principals the discretion to permit selected visitors to meet with teachers during non-class school hours, to distribute literature through the mail system, to post notices, or to have announcements made on the public address system.

---

[15]The plaintiffs assert that the term "or any other matter of business" includes *"any subject or topic whatsoever*, if it relates in any way to TSTA or to any other employee organization." Plaintiffs' Statement of Undisputed Facts at ¶ 14(d). The defendants dispute that statement to the extent that it may imply that Adm. Reg. 412 prohibits meetings not related to recruiting, organizing, or some TSTA business. The summary judgment record establishes, however, that Adm. Reg. 412 prohibits only meetings during school hours concerning some type of TSTA business — and would not, for example, prohibit a TSTA representative from meeting with a teacher on a purely personal matter, such as a parent-teacher conference concerning the child of the TSTA representative.

[16]Administrative Regulation 412(7) prohibits all persons (except school staff) from distributing material directly into teacher mailboxes. The plaintiffs do not contest this "prior review" requirement, but instead assert that they should be allowed to submit TSTA literature for distribution in the teacher mailboxes in the same manner as any other organization.

(i) *Visitation Privileges*

For example, Policy Statement 804.2 requires principals to be prepared to receive and make welcome all district personnel, patrons, educators from other school districts, and other visitors.[17] Policy Statement 425 allows salesmen and other solicitors to meet with GISD teachers at school during school hours if they receive prior permission from the school principal.[18] It provides:

> "Solicitors, vendors or salesmen shall not be permitted to confer with students or employees during school hours *without prior approval of the administrator in charge*. . . ." (emphasis added).

Policy Statements 804, 804.1 and 807 clarify Policy Statement 425 by limiting salesmen's visits to school-sponsored or related activities and by prohibiting such meetings from interfering with class time. In addition, Adm. Regs. 804.2(5) and (6)(d) require all visitors to report to the principal's office before visiting elsewhere in the building, and prohibit all visitors from roaming through the building unescorted.

---

[17]The primary purpose of Policy Statement 804.2 is to improve school-community relations and to increase the prestige of GISD in the eyes of other educators. It provides:

> "Visitation by members of the community to the school is recognized as a vital part of the process of improving school-community relations. Visitation by educators from other institutions is also vital in establishing the reputation of the school district. . . ."

[18]The defendants vigorously protest the assertion that GISD policies permit other commercial and civic organizations to meet with faculty and students during the school day. They claim that the principals have been instructed administratively not to allow such visits. The defendants, however, fail to cite any policy or testimony that substantiates their claim. Moreover, the policies specifically state that salesmen and representatives of other organizations may confer with teachers during the school day, on matters concerning school-sponsored or related activities, if they receive the principal's permission. To instruct the principals not to give their permission would make senseless a policy that allows them that discretion. Further, the deposition testimony establishes that school principals have allowed various salesmen and civic group representatives to meet with faculty and students during the school day. *See* White Dep. at 55-57 (fund-raising activities, school equipment); Richey Dep. at 28 (text-

(ii) *The Mail System, Bulletin Boards, and Public Address System*

The primary purpose of GISD's internal mail system is to distribute official messages between school administrators and teachers and among the teachers themselves. [*See* Richey Dep. at 58-60]. On occasion, however, school principals have allowed certain commercial and civic organizations to submit literature for distribution through that system. [Douglas Dep. at 48-54 — Board-approved insurance companies, PTA, Little League; White Dep. at 64 — Junior Achievement; Nix Dep. at 91 — teacher consultants; Brank Dep. at 44-45 — YMCA, Boy Scouts, Girl Scouts; Beaver Dep. at 40].

With respect to advertising and commercial announcements, Policy Statement 808 provides:

> "Advertising and commercial announcements shall be made in the schools only upon approval of the superintendent or his designee. Approved announcements shall be made by the principal. *Advertisements may not be posted or distributed on the school premises.*"

School officials, however, do allow such organizations as the YMCA, Boy Scouts, Brownies, Little League, and Board-approved insurance companies to post materials. [*E.g.*, Douglas Dep. at 23-25]. In addition, school officials allow the

---

book salesman); Nix Dep. at 61-64 (cookware salesman before school); Hardy Dep. at 65-66, 70 (Boy Scout representative, MS volunteer, PTA president).

Although Policy Statement 425 is not at issue here, this Court feels compelled to note that it is unconstitutionally overbroad. As to certain civic and commercial organizations, the GISD schools are limited public fora. For that reason, regulations affecting First Amendment rights must be narrowly and precisely drawn. The policy itself does not provide sufficient guidelines to limit the discretion of school principals. Accordingly, it fails to meet the constitutional standards for such a restriction. *See Ysleta Fed. of Teachers v. Ysleta Indep. School Dist.*, 720 F.2d 1429 (5th Cir. 1983); *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972).

same or similar organizations to submit announcements to be read over the public address system.

The Status of the GISD Policies Under Perry

There is no question that constitutional interests are implicated by the GISD policies. However, as emphasized in *Ysleta Federation Teachers v. Ysleta Independent School District*, 720 F.2d 1429 (5th Cir. 1983):

> " 'The First Amendment's guarantee of free speech applies to teachers' mailboxes as surely as it does elsewhere within the school . . . and on the sidewalks outside.' *Perry*, ____U.S.____, ____, 103 S.Ct. 948, 954, 74 L.Ed.2d 794, 804 (citations omitted). However, the federal courts have always recognized that in the school context, *judicial respect for the free exercise of First Amendment rights by teachers and students must be tempered by a recognition that school administrators have broad latitude in formulating and administering regulations to promote the safety and order necessary to the educational process. See Hall*, 681 F.2d at 967-68." (710 F.2d at 1432) (emphasis added).

Moreover, as *Ysleta* notes, in analyzing the GISD policies, *this Court is bound* by "the Supreme Court's recent and comprehensive discussion in [*Perry Education Association v. Perry Local Educators' Association*, 103 S.Ct. 948 (1983)] of the standard by which to evaluate limitations on the right of access" to the premises and facilities of a public school.[19]

Under *Perry*, the "existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry*, 103 S.Ct. at 954. Not all

---

[19] *Perry* and *Ysleta* dealt only with access to a school's internal mail system. However, the *Perry* analysis applies equally to bulletin boards, public address systems, and other school facilities — so long, as here, there are alternative means of communication. See footnote 10.

public property constitutes a First Amendment "public forum." Instead, public property falls into one of three categories:

> (i) property "which by long tradition or by government fiat [has] been devoted to assembly and debate" ("*quintessential public forums*");
>
> (ii) "property which the state has opened for use by the public as a place for expressive activity" ("*limited public forums*"); and
>
> (iii) "property which is not by tradition or designation a forum for public communication" (*nonpublic forums*). *Id.* at 954-56.

Where the property in question falls within the first or second category, the state may regulate the content of speech only by narrowly tailored laws designed to effectuate a compelling state interest — in addition, the state may enforce reasonable, content-neutral time, place, and manner restrictions. Where the property in question falls within the third category, however, the state not only may impose reasonable time, place, and manner restrictions, but also "may reserve the forum for its intended purposes, communcative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 103 S.Ct. at 954-955.

Accordingly, the status of the GISD policies under the *Perry* analysis — i.e., whether they violate the plaintiffs' constitutional rights of free speech, free association, and equal protection — depends first, on the nature of the forum, and second, on the nature of the policies.

Nature of the Forum

Although a school may be a traditional public forum for teachers and students — *See Country Hills Christian Church*

v. United School District 512, 560 F.Supp. 1207, 1214-15 (D.Kan. 1983) (cited with approval by the Fifth Circuit in *Ysleta*, 720 F.2d at 1435) — it is not a public forum for other groups unless the school district has opened its doors for use by those groups. *Perry*, 103 S.Ct. at 956. Moreover, even if the school district has granted access during school hours to representatives of certain groups, "the constitutional right of access would in any event extend only to other entities of similar character." *Perry*, 103 S.Ct. at 956. In short, "[t]his type of content-neutral selective access does not transform government property into a public forum." *Id.*

GISD has not granted permission as a matter of course to all who seek access to school facilities during school hours. *See Perry*, 103 S.Ct. at 956. Instead, the GISD policies in question permit selected groups of educators, salesmen, and representatives of civic and charitable organizations to meet with students and faculty during non-class school hours.[20] In addition, those same groups may submit materials for distribution through teacher mailboxes or for posting on school premises, and they may submit announcements to be made on the public address system. Those persons seeking access must obtain prior permission from the school principal and, in some cases, from the Superintendent's Office. In each case, the policies carefully limit the access of selected visitors by requiring them to report to the principal's office before visiting other parts of the campus, by prohibiting visitors from roaming around the campus unescorted, and by directing the school principals to take every precaution necessary to ensure that the visitors do not interrupt classes. Such selective, carefully-monitored visitation access does not cause the GISD schools to become a public forum for First Amendment purposes. *See Perry*, 103 S.Ct. at 956.

---

[20]So long as the meetings concern school sponsored or related activities and do not interfere with class time. *See* Policy Statements 804, 804.1, and 807.

In addition, the school district has not permitted any employee organization to use the internal mail system, bulletin boards, or public address system, nor has it opened these school facilities to unrestricted use by the general public. Accordingly, under *Perry*, none of these facilities constitutes a limited public forum as to employee organizations.[21] Because the defendants have not, either by policy or practice, transformed either the school building, the surrounding premises or the internal facilities into a limited public forum for employee organization, *Perry* permits the GISD Board to promulgate time, place, and manner restrictions along with other regulations designed to "reserve the forum for its intended use," so long as those regulations are both reasonable and content-neutral.[22]

Reasonableness of the Policies

"Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject

---

[21]Even if the GISD had created a limited public forum by permitting such selective visitation and use of the mail systems, bulletin boards and public address system, only members of groups similar to the ones already allowed access would enjoy a constitutional right of access. It is undisputed that GISD policies deny the right of access to all employee organizations. Accordingly, no employee organization would enjoy such a right. As *Perry* states:

> "Moreover, even if we assume that by granting access to the Cub Scouts, YMCAs, and parochial schools, the school district has created a 'limited' public forum, the constitutional right of access would in any event extend only to the other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club and other organizations that engage in activities of interest and educational relevance to students, *they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.*" 103 S.Ct. at 956 (emphasis added).

[22]The plaintiffs vigorously assert that the *Tinker-Shanley* test applies here. Under that test, school officials may prohibit expressive conduct only if it "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school." *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). That test, however, applies only to a public forum. *See Connick v. Meyers*, 103 S.Ct. 1684, 1692 & 1692 n.12. *Tinker*, unlike this case, dealt with the First Amendment rights of *students* for whom a school is a public forum.

matter and speaker identity, . . . [so long as] they are reasonable in light of the purpose which the forum at issue serves." *Perry*, 103 S.Ct. at 957. The defendants correctly argue that the exclusion of employee organizations, while granting access to selected groups — such as the Boy Scouts, the PTA, and other civic and community organizations, is reasonable in light of a school's function. In particular, the defendants make these arguments:

> Schools exist as places of learning. The school day, while relatively short, is intense. With little free time, teachers must focus constantly on their two primary responsibilities — teaching and maintaining order and discipline. Even during their thirty minute lunch break, most teachers must remain on the school premises and help maintain order in the school cafeteria. In short, the school day is simply too limited for the discussion of matters not related to either the curriculum or student welfare.
>
> The GISD Board of Trustees promulgated Policy Statement and Administrative Regulation 412 to ensure that the school district maintains a position of neutrality with respect to employee organizations as required by state law, and to prevent employee organizations from distracting teachers away from their teaching duties during school hours. These policies are reasonable because they protect the learning process from outside interference, while permitting limited contacts by selected civic and commercial organizations — so long as these contacts concern school-sponsored or related activities and do not interfere with classes.[23]

---

[23] *Perry* notes that if a teachers union "were given access to the mailboxes, it would be equally imperative that any other citizen's group or community organization with a message for school personnel — the chamber of commerce, right-to-work groups, or any other labor union — also be permitted access to the mail system . . . [This] would invite schools to close their mail systems to all but school personnel." *Perry*, 103 S.Ct. at 957, note 9.

These are valid considerations and, under *Ysleta*, school administrators must be afforded some, if not "broad latitude in formulating and administering regulations to promote the safety and order necessary to the educational process." 720 F.2d at 1432. In addition, the school mail system, bulletin boards, and public address system are designed to transmit "official messages." In most schools, student announcements constitute the bulk of the information transmitted. Allowing these announcements is perfectly reasonable because they relate to school or community-sponsored events that constitute part of the overall learning process. Moreover, the record establishes that, on those occasions when a school principal has allowed a salesman to meet with teachers during school hours, the meeting concerned school equipment, textbooks, or other items related to the learning process. The terms and conditions of teacher employment do not bear *directly* on either the curriculum or other aspects of the learning process. The distinction between civic and commercial groups sponsoring events or selling items related to the learning process and employee organizations concerned with the terms and conditions of teacher employment rests on the identity of the organization and the subject matter sought to be discussed. Accordingly, that distinction is both content-neutral and reasonable. *Perry*, 103 S.Ct. at 957-58.

Finally, just as in *Perry*, the reasonableness of the GISD limitations on the plaintiffs' access to teachers during school hours "is also supported by the substantial alternative channels that remain open for union-teacher communication to take place." Here, these means range from meetings and distribution of literature on school premises *during non-school hours* to contacts with the teachers at home. *See* footnote 10; *Perry*, 103 S.Ct. at 959. Just as in *Perry*:

> "There is no showing here that [the plaintiffs'] ability to communicate with teachers is *seriously impinged* by the restricted access to the [GISD facilities]. The variety and type of alternative modes of access present here compare favorably with those in other non-public forum cases where we have upheld restrictions on access.

> See, *e.g. Greer v. Spock*, 424 U.S., at 839, 96 S.Ct., at 1218 (servicemen free to attend political rallies offbase); *Pell v. Procunier*, 417 U.S. 817, 827-828, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974) (prison inmates may communicate with media by mail and through visitors)." 103 S.Ct. at 959 (emphasis added).

Therefore, *Perry* compels this Court to find that the GISD policies do not violate the plaintiffs' constitutional rights to free speech, free association, or equal protection. However, two additional claims must be addressed.

Vagueness and Overbreadth

Contrary to the plaintiffs' assertions (and with the exception noted below), the challenged policies are neither vague nor overbroad. In clear, specific terms, Adm. Reg. 412 prohibits representatives of employee organizations from recruiting, organizing or meeting with teachers on school premises during school hours. And, it prohibits employee organizations from using the school mail system, the teacher mailboxes, the bulletin boards, and the public address system. *These prohibitions are absolute*, leaving school principals with no discretion to alter them. Moreover, they are susceptible to only one reasonable interpretation. In the rare instance in which a school principal has allowed a TSTA representative to confer with a teacher during school hours, he did so in conscious disregard of the GISD policy. Accordingly, Adm. Reg. 412 is neither vague nor overbroad, either on its face or as applied.

However, the first sentence of subsection 4 and the second sentence of subsection 5 permit employee organization to use school premises for meetings during non-school hours "upon request to and approval by the local school principal." Because this "prior clearance rule lacks the guidelines, criteria or standards that would render the rule constitutionally acceptable by limiting the discretion" of the GISD principal, these portions of Adm. Reg. 412 are unconstitutionally overbroad. *Ysleta*, 720 F.2d at 1434. *See Shanley v. Northeast Independent School District*, 462 F.2d 960, 976 (5th Cir. 1972). But in this case — where there is no evidence that any GISD official refused to permit the plaintiffs to use

school premises during non-school hours (see footnotes 3, 10) — this exception is of minor significance.

Administrative Review

The plaintiffs assert that GISD failed to provide an administrative process to review adverse decisions by principals concerning the challenged policies, and that this failure violates their constitutional rights to due process. The defendants respond that Policy Statement 106.4, governing complaints, sets forth a specific, expedited review process that satisfies the requirements of *Shanley v. Northeast Independent School District,* 462 F.2d 960, 977-78 (5th Cir. 1972).[24]

The defendants are correct. Policy Statement 106.4 provides a specific, expedited means of complaining about a principal's interpretation or implementation of GISD policies. The plaintiffs did not request a copy of this Policy Statement nor, apparently, did they make a formal complaint to the principals involved, as required by Policy Statement 106.4.[25] In addition, 19 T.E.C. § 61.231 provides

---

[24]The Parties' Stipulations, filed on December 14, 1982, contain a complete copy of Policy Statement 106.4. It specifically provides:

> "The procedures outlined in the above paragraphs shall be available to parent advisory councils, parents, *teachers, and other concerned organizations or individuals,* and shall be disseminated to interested parties, *including school district employees,* parent-teacher organizations, ESEA Title I district and campus parent advisory committees *and anyone else requesting a copy of these procedures.*" (emphasis added)

[25]The plaintiffs argue that, on December 30, 1980, Frank Hill (TSTA counsel) wrote to GISD official Harry Beavers "suggesting a conference between T.S.T.A. and the Garland I.S.D. administration for the purpose of discussing and perhaps developing alternatives or modifications to the policies and practices . . ." at issue. The defendants never responded to that request because, according to them, such a conference would have been fruitless since the Board of Trustees, not the school administration, formulates school district policies. Whether fruitless or not, the defendants should have responded to the Hill letter by informing the plaintiffs of the proper procedure by which to challenge Board policies. On the other hand, the plaintiffs, aided by legal advice at that point, could have requested a formal hearing before the GISD Board of Trustees, but failed to do so.

for a hearing before the local school board for "grievances or controversies involving administration actions or problems . . . provided request in writing has been timely filed . . . as prescribed in § 157.43 . . . of this title." The record does not establish that the plaintiffs timely filed a hearing request. Accordingly, the plaintiffs were not denied due process.

In any event, under Adm. Reg. 412, school principals do not have the discretion to grant access to the school premises during school hours to representatives of employee organizations. Accordingly, any administrative review of a decision to follow Adm. Reg. 412 would be fruitless. An employee organization must either request a hearing before the GISD Board of Trustees, or, as the plaintiffs did, file a lawsuit. Moreover, if an employee organization should be denied permission to hold a meeting on school premises during non-school hours, it certainly may appeal by following the procedures outlined in Policy Statement 106.4. Accordingly, the due process rights of employee organizations are protected.

For the reasons discussed, the Plaintiff's Motion for Summary Judgment is DENIED, with the exception that the stated portions of Adm. Reg. 412(4) and (5) are unconstitutionally overbroad. With the same exception, the defendants' Motion for Summary Judgment is GRANTED. Since the plaintiffs are not "prevailing parties" under 42 U.S.C. § 1988,[26] and since their suit was certainly not frivolous or brought in bad faith, neither side is entitled to an award of attorneys fees. Costs, however, are taxed against the plaintiffs.

SIGNED this 24 day of August, 1984.

/s/ JERRY BUCHMEYER
UNITED STATES
DISTRICT JUDGE
JERRY BUCHMEYER

[26]Because of *Perry*, the *only* issue on which the plaintiffs prevailed was one of minor significance in this case (see footnotes 3, 10), since there was no evidence that the plaintiffs were ever refused permission to use school premises during non-school hours. *See Hensley v. Eckerhart*, 103 S.Ct. 1933 (1983).

TEXAS STATE TEACHERS ASSOCIATION, Garland Education Association, Joe Atkins and Janice Hill, *Plaintiffs-Appellants,*

v.

GARLAND INDEPENDENT SCHOOL DISTRICT, et al., *Defendants-Appellees.*

No. 84-1833.

United States Court of Appeals, Fifth Circuit. Dec. 6, 1985.

Teacher organization brought suit alleging that school policies restricting their access to school property and use of school facilities during school hours violated their constitutional rights. The United States District Court for the Northern District of Texas, Jerry Buchmeyer, J., granted summary judgment to school district, and teacher organization appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) school district had not created a public forum or limited public forum in either the schools themselves or schools' mail facilities, and therefore denying teacher organization access to schools and school mail facilities during school hours did not violate their First Amendment rights, but (2) school policies purporting to deny teachers right to discuss teacher organization during nonclass time, and preventing teachers from using school mail facilities to mention "employee organizations" were unconstitutional under the First Amendment.

Affirmed in part; reversed in part and remanded.

1. Constitutional Law 90.1(4)

Existence of right of access to public property and standard by which limitations upon such right must be evaluated differ depending upon character of property at issue. U.S.C.A. Const.Amend. 1.

2. Constitutional Law 90.1(1.4)

Schools are not considered traditional public forums in which outside visitors may freely espouse their views. U.S.C.A. Const.Amend. 1.

3. Schools 20

School administrators must be given broad discretion in supervising visitation of school environment by persons not associated with the school.

4. Constitutional Law 90.1(1.4)

Selective visitation policy, pursuant to which schools permitted groups of educators, textbook salesmen, and representatives of civic and charitable organizations to meet with students and faculty during nonclass school hours, did not create a public forum in the schools so as to compel finding that First Amendment rights of teacher organization were violated when school district denied its members access to school grounds and school media facilities. U.S.C.A. Const.Amend. 1.

5. Constitutional Law 90.1(1.4)

By allowing educators, salesmen and the like access to school property to discuss school-related activities, school district did not create a limited public forum so as to provide teacher organization with a constitutional right of access, since those permitted access were not "similar entities" to teacher organization, which was concerned with employment practices and procedures. U.S.C.A. Const.Amend. 1.

6. Constitutional Law 242.2(1)

School policy permitting certain groups, such as educators, salesmen and the like to discuss school-related activities on school property during school hours did not violate

equal protection rights of teacher organization, which was denied access, as the policy rationally furthered a legitimate state purpose, that of limiting contacts during school days so that teachers might concentrate on teaching. U.S.C.A. Const.Amend. 14.

7. Constitutional Law 90.1(1.4)

Unless it has been opened to the general public, a school mail system is not a public forum; same is true of school billboards and public address system, so long as there are alternate channels of communication. U.S.C.A. Const.Amend. 1.

8. Constitutional Law 90.1(1.4)

By allowing certain civic and commercial groups to distribute literature through school facilities, school district had not created a public forum in schools' communication facilities, and therefore denial of access to those facilities to teacher organization did not violate the organization's members' First Amendment rights. U.S.C.A. Const.Amend. 1.

9. Constitutional Law 90.1(1.4)

No entity similar to teacher organization had been granted access to school facilities to use schools' communication facilities, and therefore teacher organization had no right of access to those facilities under a First Amendment claim of limited public forum. U.S.C.A. Const.Amend. 1.

10. Schools 20

Application of school policy to teacher organization to deny access to school property and facilities during school hours was not neccessary in order to comply with Education Code section, V.T.C.A., Education Code § 21.904, which forbids school districts from coercing teachers to join any group, club, committee, organization or association, as a policy allowing all employee organizations access under the same guidelines would not constitute "coercion."

11. Constitutional Law 90.1(1.4)

Regulations on speech of those who teach within the schools must be drawn more narrowly than regulations on speech of outside representatives.

12. Constitutional Law 90.1(1.4)

School policies purporting to deny teachers right to discuss teacher organization during nonclass time were unconstitutional under the First Amendment, as there was no demonstration that such conversations would result in a material and substantial interference with the activities or discipline of the school. U.S.C.A. Const.Amend. 1.

13. Constitutional Law 90.1(1.4)

School policies preventing teachers from using school mail facilities to mention "employee organizations" were unconstitutional under the First Amendment, as were prohibitions against use of whatever billboard facilities were set aside for teachers' personal messages, as there was no showing that such use would constitute a material and substantial disruption with activities or discipline of the school. U.S.C.A. Const.Amend. 1.

Robert H. Chanin, Jeremiah A. Collins, Washington, D.C., for plaintiffs-appellants.

Law Offices of Earl Luna, Earl Luna, Robert E. Luna, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before GARZA, JOHNSON and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This appeal involves a claim brought by a teacher organization against a school district under 42 U.S.C. § 1983 (1981). Appellants contend that policies of appellees deny them access to school grounds and school media facilities and restrain free speech in violation of their First and Fourteenth Amendment rights. Appellants are the Texas State Teachers Assocation (TSTA); the Garland Education Assocaition (GEA), a TSTA local affiliate; Joe Atkins, a TSTA

employee; and Janice Hill, a GEA member employed as a teacher in the Garland Independent School District (GISD). Appellees are GISD; Harris Hill, Donald Center, Cash Birdwell, Jim Burns, Mike Cloud, Don Hollenshead, and M.D. Williams, IV, in their official capacities as GISD Trustees; and Eli Douglas in his official capacity as GISD Superintendent. The District court determined that appellants had no constitutionally protected right of free speech access to GISD schools, and granted summary judgment in favor of appellees. TSTA appeals from the grant of summary judgment against them, and from the denial of their motion for partial summary judgment.

FACTS

TSTA is a voluntary employee organization. It sought to distribute TSTA information to teachers in GISD schools during school hours. TSTA also wanted to use school communication facilities — including school mailboxes, billboards, and the public address system — as mediums for the distribution of their information.

GISD policy, as expressed in Administrative Regulation 412,[1]

[1]Administrative Regulation 412 prohibits representatives of employee organizations from recruiting, organizing, or meeting with GISD teachers on school grounds during school hours. In addition, it denies employee organizations any access to the school's internal mail system, teacher mailboxes, bulletin boards, and public address system. It provides, in pertinent part:

> Relationships with employee organizations will be consistent with article 21-904 of the Texas Education Code. Accordingly, the following procedures will be observed:
>
> 1. Employee membership in any organization is a matter of free choice.
> 2. The central and local school administration position is neutral. It neither encourages nor discourages membership in any employee organization.
> 3 Faculty meetings called and conducted by the principal are for school-related matters. An employee organization matter shall not be part of the agenda.
> 4. Organizational meetings of local building members before or after school hours may be held in school facilities upon request to and approval by the local school principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.

totally prohibits any "employee organization"[2] from meeting or recruiting during "school hours",[3] and from using school communication facilities for the dissemination of information concerning employee organizations. GISD policy allows employee organizations to meet or recruit teachers on school premises before 8:00 a.m. or after 3:45 p.m. "upon request to and approval by the local principal." GISD policy also allows the distribution of literature on school premises (parking lots, hallways, and placement on teachers' desk) during non-school hours.

On January 8 and 9, 1981, TSTA representatives visited numerous GISD schools during school hours. Relying on GISD Administrative Regulation 412, the principal or assistant principal of most schools refused to permit the TSTA representatives to distribute literature or to meet with GISD teachers.

---

5. Group meetings or individual conferences conducted by an elected official of any employee organization for purposes of membership recruitment or any other matter of business, *shall not be conducted on school premises during school hours.* School facilities may be used for such purposes before or after school hours upon request to and approval by the local principal. Meetings held before school hours must be adjourned no later than 8:00 a.m. or the privilege will be denied.
6. The school mail service shall not be used by any employee organization.
7. Distribution of material directly in mailboxes at the school is prohibited.
8. The use of school district equipment and supplies by any employee organization is prohibited.
9. The public address system is for school business only. Association announcements shall not be made on school equipment.

School officials interpret the phrase "elected official" in Admin.Reg. 412(5) as including any employee representative, whether or not an elected representative, so long as that employee is "promoting" the organization. School officials interpret Admin.Reg. 412(8) as prohibiting the use of school billboards by employee organizations.

[2]"Employee Organization" is defined as any organization whose main purpose is to represent a group of employees in matters of employment practices and procedures. The parties stipulated that both TSTA and GEA are employee organizations within the meaning of the GISD policies.

[3]The term "school hours" means "the entire period between 8:00 a.m. and 3:45 p.m. of each school day except for days when school may be let out early."

This lawsuit resulted. Appellants claimed that these GISD policies violated their First and Fourteenth Amendment rights of free speech, free association, and equal protection of the laws, and were unconstitutionally vague and overbroad. Appellants argued that these policies, as interpreted and implemented by school officials, operated to deny GISD teachers their right to discuss TSTA business even during nonclass times such as the lunch hour (several GISD teachers and administrators are members of TSTA). Appellants further contended that school officials routinely granted access to school communication facilities to other commercial and civic organizations (upon approval of the principal), and that "employee organizations" were discriminatorily denied access.

Appellees denied that their policies violated the appellants' First and Fourteenth Amendment rights. They argued that the GISD schools are not a public forum, and therefore appellants have no right of access. Appellees urged that reasonable alternative means of communication were available to TSTA — *i.e.*, meeting after school hours, distributing literature on school property after school hours, or contacting teachers at school or home through the United States Postal Service. Finally, appellees contended that allowing employee organizations to use school facilities would disrupt the learning process and would be contrary to Texas Education Code § 21.904 — which requires a school district to maintain a position of neutrality with respect to employee membership in various organizations.[4]

The parties each filed a motion for summary judgment. The district court granted appellants' motion for partial summary judgment as to Admin.Reg. 412(4) and (5) — which permits employee organizations to use school premises for meetings during non-school hours only "upon request to and approval by the local school principal." The

[4]Section 21.904 provides, in pertient part: "No school district, board of education, superintendent, assistant superintendent, principal, or other administrator benefitting by the funds provided for in this code shall directly or indirectly require or coerce any teacher to join any group, club, committee, organization, or association . . ." TEX.EDUC.CODE § 21.904 (Vernon 1972).

district court held that this rule was unconstitutionally overbroad.[5] This holding is not appealed. As to the remainder of appellants' claims, the district court granted appellees' motion for summary judgment and denied appellants' motion. We reverse in part and affirm in part.

THE RIGHT TO COMMUNICATE

[1] In granting the GISD motion for summary judgment, the district court relied upon *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Under *Perry*, the "existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending upon the character of the property at issue." *Perry*, 460 U.S. at 44, 103 S.Ct. at 954, 74 L.Ed.2d at 804.

Perry describes the three types of forums that exist in public property for First Amendment purposes at 460 U.S. 45, 103 S.Ct. 954-55, 74 L.Ed.2d 804: (1) *Public Forums:* These are areas "which by long tradition or by government fiat have been devoted to assembly and debate." Examples are public streets and parks. Speech may not be suppressed for content in these forums unless the state shows a "compelling state interest" and a regulation "narrowly drawn to achieve that end." Public forums are also subject to reasonable "time, place, and manner" restrictions. (2) *Limited Public Forums:* These are forums which the state has voluntarily "opened for use by the public as a place for expressive activity." As long as the forum remains open, speech is protected to the same extent as in a public forum. In a limited public forum, only "similar entities" to those allowed access have a protected right of speech. (3) *Non-Public Forums:* This is "property which is not by tradition or designation a forum for public communication." In a non-public forum, "the state may reserve the forum for its intended purposes . . . so long as the regulation on speech is

[5]Because appellants did not show any refusal of access during non-school hours, no relief was given with respect to this holding.

reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

GISD policy, as expressed in Administrative Regulation 412, affects two different classes of communications: (1) communications instigated by outside representatives of TSTA who desire access to teachers and school communication facilities; and (2) communications among GISD teachers employed by the schools. A different analysis is relevant to each separate type of communication. Because appellants are appealing a summary judgment, we must look at the evidence in the light most favorable to them. *Simon v. United States*, 711 F.2d 740, 743 (5th Cir.1983).

A. *Communications of Outside TSTA Representatives*

1. *During school hours*

[2, 3] Schools are not considered traditional public forums in which outside visitors may freely espouse their views. *See Widmar v. Vincent*, 454 U.S. 263, 267 n. 5, 102 S.Ct. 269, 273 n. 5, 70 L.Ed.2d 440, 446 n. 5 (1981); *Perry*, 460 U.S. at 47, 103 S.Ct. at 956, 74 L.Ed.2d at 806. Moreover, school administrators must be given broad discretion in supervising the visitation of the school environment by persons not associated with the school. *Hall v. Board of School Commissioners of Mobile County, Alabama*, 681 F.2d 965 (5th Cir.1982). Because GISD schools are not public forums, outside TSTA representatives have no constitutional right of access. *Professional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258, 263 (5th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 248, 83 L.Ed.2d 186 (1984). Appellants argue, however, that the school has allowed other visitors from civic and commercial groups to meet with teachers during school hours, and has therefore voluntarily created either a public forum or a limited public forum.

[4] GISD permits selected groups of educators, textbook salesmen, and representatives of civic and charitable organizations to meet with students and faculty during non-class school hours. These meetings must concern school-sponsored or related activities and must not interfere with

class time. Those persons seeking access must obtain prior permission from the school principal, and in some cases, from the Superintendent's office. The district court found that:

> In each case, the policies carefully limit the access of selected visitors by requiring them to report to the principal's office before visiting other parts of the campus, by prohibiting visitors from roaming around the campus unescorted, and by directing the school principals to take every precaution necessary to ensure that the vistors do not interrupt classes.

This selective visitation policy does not create a public forum in GISD schools. *Perry*, 460 U.S. at 47, 103 S.Ct. at 956, 74 L.Ed.2d at 806.

[5] In addition, outside TSTA representatives are not due any right of visitation through the doctrine of "limited public forum." Even though the school district has granted access during school hours to representatives of certain civic and commercial groups, "the constitutional right of access would in any event extend only to other entities of similar character." *Id.* Under *Perry*, the visitors allowed access — educators, salesmen, and the like, discussing school-related activities — are not "similar entities" to an employee organization, such as TSTA, concerned with teacher employment practices and procedures.

In *Perry*, a teacher organization (PLEA) sought access to school mail facilities. A rival union (PEA), and civic groups such as the girl scouts, boys' club, and the YMCA were granted access. Nevertheless, the *Perry* court held that even if a limited public forum had been created by the school, PLEA had no constitutional right of access because it was not a similar entity to the groups already allowed access. PLEA was not similar to the civic groups because, unlike those groups, it was an organization concerned with "terms and conditions of teacher employment." 460 U.S. at 48, 103 S.Ct. at 956, 74 L.Ed.2d at 806. The same is true of TSTA's relationship to the civic groups granted access by GISD. PLEA was not similar to PEA because PEA was the exclu-

sive bargaining representative, while PLEA was not. *Id.* In the present case, GISD does not grant access to *any* "employee organizations." Therefore, TSTA's claim that they are a "similar entity" to the civic groups allowed access by GISD fails under the *Perry* holding.[6] We hold that GISD policies are constitutional as applied to the visitation of the school by outside TSTA representatives during school hours.

[6] Appellants also contend that policies of GISD constitute impermissible content discrimination in violation of the equal protection clause of the Fourteenth Amendment. Since outside representatives of TSTA have no First Amendment right of access to the school, the grant of access to other organizations does not burden a fundamental right of TSTA. *Perry*, 460 U.S. at 52, 103 S.Ct. at 959, 74 L.Ed.2d at 809. Therefore, the school district's policy need only rationally further a legitimate state purpose. *Id.* We find one of the justifications advanced by GISD — that of limiting contacts during the school day so that teachers may concentrate on teaching — survives the test of rationality. Therefore, we find no merit in appellant's equal protection claim as it relates to outside representatives of TSTA.

---

[6]TSTA attempts to distinguish *Perry*. TSTA argues that the groups allowed access in *Perry* were not similar entities to PLEA because the groups granted access were "organizations that engage in activities and educational relevance to students," while PLEA was a group that was concerned with *teacher* issues. *See Perry*, 460 U.S. at 47, 103 S.Ct. at 956, 74 L.Ed.2d at 806. Thus, TSTA contends that the school district in *Perry* had opened its doors to groups discussing student issues, but not groups discussing teacher issues. TSTA argues that the present case is distinguishable from *Perry* because GISD allows access to groups concerned with solely "teacher" issues — for example, YMCA teacher swimming and bowling teams.

The facts in *Perry* do not support TSTA's distinction. The school district in *Perry did* allow access to groups concerned with solely "teacher" issues. For example, PEA, the teacher union which had bargaining representative status, was allowed access. Also, there is no indication that the communications of the *Perry* YMCA were substantially different from the communications of the GSID YMCA. Nevertheless, *Perry* held that PLEA was not a similar entity to the groups allowed access.

2. *Use of school mail facilities*

[7] Unless it has been opened to the general public, a school mail system is not a public forum. *Perry*, 460 U.S. at 47, 103 S.Ct. at 955-56, 74 L.Ed.2d at 806. The same is true of school billboards and the public address system so long as there are alternative channels of communications. *See Connecticut State Federation of Teachers v. Bd. of Educ. Members*, 538 F.2d 471, 480-81 (2nd Cir.1976).

Appellants argue that GISD allows other commercial and civic organizations to use school communication facilities. They then contend that either a public forum or a limited public forum has been created in GISD communication facilities, to which the appellants should be granted access. Appellants assert that "employee organizations" are the only groups denied access to GISD facilities.

[8] The evidence indicates that GISD has not created a public forum in its communication facilities. On occasion, school principals have allowed certain civic and commercial groups to distribute literature through school facilities. For example, GISD sometimes allows access to organizations such as the PTA, Little League, Boy Scouts, Junior Achievement, teacher bowling and swimming groups, and Board-approved insurance companies. Similarly, in *Perry*, certain community and civic groups — *i.e.*, the Cub scouts, YMCA, local church groups, etc. — were granted access to school mailboxes. Nevertheless, *Perry* held that "[t]his type of selective access does not transform government property into a public forum." 460 U.S. at 47, 103 S.Ct. at 956, 74 L.Ed.2d at 806.

[9] Likewise, TSTA has no right of access under a claim of "limited public forum." No "similar entities" to TSTA — *i.e.*, other employee organizations — are granted access to GISD facilities.[7] It is permissible to refuse to "grant employee organizations the right to use the school mails at all." *Ysleta Fed. of Teachers v. Ysleta Ind. Sch. Dist.*, 720

[7] *See supra* note 6 and accompanying text (TSTA not "similar entity" to groups allowed access).

F.2d 1429, 1433 (5th Cir.1983). In short, GISD has not created a public forum and also has not created a "limited public forum" for entities similar to employee organizations. Therefore, we hold that GISD may prevent outside representatives of "employee organizations" from using school communication facilities.

[10] It is important to note, however, that GISD's argument that Admin.Reg. 412 is necessary in order to comply with Texas Education Code §21.904 — which forbids school districts from "coerc[ing]" teachers to join any "group, club, committee, organization, or association" — is without merit. Appellees contend that allowing the mention of TSTA or other employee organizations on campus during school hours will somehow be seen as "coercion" by the school district to join those organizations. However, a policy which allows all employee organizations access under the same guidelines does not constitute "coercion." *See Widmar*, 454 U.S. at 273-76, 102 S.Ct. at 276-78, 70 L.Ed.2d at 449-51 (mere grant of access to religious organization does not "confer any imprimatur of state approval"); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 165 (4th Cir.1976) (No university approval of organization implied from university's recognition of organization).[8]

B. *Communications of GISD Teachers.*

1. *Private Communications*

[11] Regulations on the speech of those who teach within the schools obviously must be drawn more narrowly than regulations on the speech of outside representatives. *See Country Hills Christian Church v. United School District 512*, 560 F.Supp. 1207, 1214-15 (D.Kan.1983) (cited with approval by this Court in *Ysleta*, 720 F.2d at 1435); *Hall*, 681 F.2d at 968 (distinction exists between teacher communications and the rights of "persons not assigned to the schools"). *Perry*, which concerns the rights of organizations

[8]Curiously, GISD permits communications concerning other teacher groups, such as bowling teams, without any apparent concern that it is thereby coercing teachers to join such groups.

outside the schools, does not apply to teacher communication within the school. *See Country Hills*, 560 F.Supp. at 1215, 1220; *see also Hastings v. Bonner*, 578 F.2d 136, 143 (5th Cir.1978) ("[T]here is no doubt that this circuit has adopted and now applies the *Tinker* test in cases involving the First Amendment rights of teachers.") The *Tinker* test comes from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), which held that teacher communications may be suppressed only when "the expression or its method of excercise materially and substantially interferes with the activities or discipline of the school." *Id.; see also Shanley v. Northeast Ind. Sch. Dist.*, 462 F.2d 960, 969 (5th Cir.1972).

The evidence indicates that school officials interpret Admin.Reg. 412 as prohibiting *any* discussions among teachers relating to TSTA or TSTA business or relating to any teacher organization that occur on school premises during school hours, even though those discussions occur during lunch hour or other non-class time.[9] Although acknowledging that such an interpretation is unconstitutional, the dis-

---

[9]Assistant Superintendent Beavers testifed as follows:

Q: Can you tell me whether the district has a policy or practice which prohibits teachers from discussing teacher employee organization matters between the hours of 8:00 and 3:45 on school days?

A: Yes, we do.

Q: Does it matter what the content of the conversation is or where on campus it occurs?

A: No it doesn't.

Q: Are two teachers — does it matter whether they are members or nonmembers of an organization?

A: No.

Q: If two teachers then are walking down the hall going to lunch and they start chatting about an upcoming TSTA seminar in Austin, is this a violation of that policy?

Q: Technically it would be.

* * * * *

Q: If two teachers are sitting having lunch and they start talking about a TSTA membership drive and nobody else is within earshot and both of them are voluntarily partaking of the conversation, is that a violation of your district's policies?

A: Technically it would be a violation.

trict court disregarded this issue because it found that "there has never been any attempt to enforce such an interpretation." After reviewing the evidence in the light most favorable to appellants, we must disagree.

[12] First, it is undisputed that school officials *would* prohibit GISD teachers from discussing TSTA if, in their view, such discussion amounted to "promoting" the organization. The district court found (and appellees argue on appeal) that punishment of speech "promoting" employee organiza-

---

Principal Hardy testified as follows:

Q: If I were a member of TSTA and I were a member of your faculty, would there ever be a circumstance under which I could discuss TSTA business with other faculty members during school hours?

A: Not during school hours.

* * * * *

Q: [I]n general if one wanted to [discuss TSTA business during school hours], he or she could not, could she?

A: She probably could illegally. She couldn't —

Q: If she did so, she would be violating the rules, wouldn't she?

A: Yes.

Q: What rules are we talking about? Are we still talking about Administration Regulation and Policy —

A: 412.

Principal White testified as follows:

Q: Do you have a policy as to whether two or more teachers can confer regarding teacher organization matters during school hours?

A: Yes.

Q: What is the policy?

A: 412.

Q: They can't do it?

A: No.

Q: Does it matter whether they are members of an organization?

A: No.

Superintendent Douglas testified as follows:

Q: Can four non-elected members of TSTA who happen to be teachers and who happen to be taking a 10-minute coffee break in your teachers' lounge or work room — can they legitimately discuss next month's TSTA seminar in Austin?

A: We ask our staff members from refrain from discussing professional organizations and associations during the course of the school day.

Q: From 8:00 to 3:45?

A: 8:00 to 3:45.

Q: So it would be technical violation?

A: Yes.

tions is justified under an opinion of the Texas Attorney General. Texas Atty.Gen.Op. M.W. 89 held that it was a violation of the Texas Constitution to allow teachers to perform employee organization business on a "release time" basis.[10] The Attorney General found that such a program was unconstitutional because it "constitutes an unconditional grant of public funds to a private organization." Appellees urge that private teacher discussions during non-class time are comparable to the "release time" program.

The "release time" program is not at all comparable to private teacher conversations even though those conversations may be proselytizing. The "release time" program provided that teachers who would otherwise be teaching would be allowed to be absent from their teaching duties for a specified number of days to work for an employee organization at the school district's expense. Here, in contrast, the issue is the right of teachers to discuss matters relating to employee organizations at times when the teachers would not otherwise be required to teach, but would be "free to talk about whatever they want," including "the Cowboy game . . . [or] what they did over the weekend."[11] To allow teachers to speak favorably of an employee organization does not constitute an unlawful "grant of public funds to [the] organization," any more than to allow teachers to speak favorably of a political party, a church, a club, or a football team during the lunch hour constitutes an unlawful grant of public funds to such an organization.[12]

Second, there is firm evidence indicating that officials might be inclined to enforce their policies against *all* teacher speech mentioning TSTA that occurs on school premises during the school day whether the teacher is in the classroom or not.[13] Appellees' evidence in response demonstrates

[10]The "release time" program provided that "nine days of release time with full pay will be allotted to professional organizations for each 100 members who are in good standing."

[11]Testimony of Assistant Superintendent Beavers and Principal White.

[12]The "release time" program is not at issue in this case and we express no opinion regarding the Texas Attorney General's Opinion.

[13]*See* testimony, *supra* note 9.

only that there is no active monitoring of teacher conversation.[14] This evidence does not establish that officials would refrain from enforcing violations of which they became aware. For example, there is no indication that officials would not take at least some sort of disciplinary action against a teacher whose violation of Admin.Reg. 412 was reported to officials by another teacher.

Finally, the mere fact that this policy exists is sufficient to support appellants' cause of action. Even if no officials attempt to overhear teacher conversations, conscientious teachers should be expected to obey school regulations.[15] The regulation inhibits the speech of law abiding teachers. Thus, even without actual monitoring of conversations, the rule chills teacher speech in violation of their First Amendment rights. *See Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *Spartacus, etc. v. Board of Trustees of Illinois*, 502 F.Supp. 789, 796-97 (N.D.Ill.1980) ("Injury to First Amendment rights may result from the threat of enforcement itself, since it may chil' . . . ardor and desire to engage in protected expression.").

---

[14]The district court referred to the following testimony in concluding that "there has never been any attempt to enforce such an interpretation" of Admin.Reg. 412(5):

Q: Now on just general freedom on speech on talking about whatever they want to talk about, there is no attempt to monitor or keep the teachers from talking about whatever they want to talk about, is there?

A: (Principal White) None whatsoever.

* * * * *

Q: But you don't have any way of monitoring it to eavesdrop on people to be sure that they didn't talk about the party they went to last night?

A: (Assistant Superintendent Beavers) No, sir, we don't do that.

Q: But being responsible people you would expect them [the teachers] to keep their conversation generally along the lines of the school business?

A: Yes sir.

[15]Although acknowledging that officials do not eavesdrop on conversations, Assistant Superintendent Beavers testified as follows:

Q: Teachers are professional people?

A: Yes.

Q: And you expect them generally to follow the regulations?

A: Yes, we do.

We hold that GISD policies which purport to deny teachers the right to discuss TSTA or TSTA business during non-class time are unconstitutional. Appellees have not demonstrated that such conversations result in a "material and substantial interference with the activities or discipline of the school."

2. *Use of school media facilities*

The primary purpose of GISD's internal mail system is to distribute official messages between school administrators and teachers and among the teachers themselves. GISD allows teachers to communicate with each other on any subject, including purely personal matters, except for subjects relating to employee organizations.[16]

[13] Appellees argue that prohibiting teacher communications as they relate to "employee organizations" is proper because it preserves the neutrality mandated by the Texas Education Code. As noted above, we find no merit to that contention.[17] Teachers who have access to school media facilities for even purely personal matters cannot be prohibited from the exercise of that right simply because their internal speech may concern "employee organizations." We therefore hold that GISD policies preventing teachers from using school mail facilities to mention "employee organizations" are unconstitutional. So also are prohibitions against the use of whatever billboard facilities may be set aside for teachers' personal messages. No "material and substantial" disruption has been shown.

---

[16]Neither appellees nor appellants distinguish access to use the public address system from the access granted to use the mail system or the school billboards. Obviously, schools do not generally allow teachers to broadcast personal messages over their loudspeakers. The use of the public address system has not been placed at issue in this case.

[17]*See* text accompanying note 8, *supra*.

CONCLUSION

We affirm that part of the summary judgment which upholds Administrative Regulation 412's prohibition against visitation and use of school media by outside employee organization representatives during school hours. We reverse that part of the summary judgment which upholds Administrative Regulation 412's application to private teacher conversations and use of school media facilities by teachers employed in GISD schools as those media facilities are otherwise available to teachers for their personal messages. We grant appellants' motion for partial summary judgment holding the application of the Regulation to these activities unconstitutional.

AFFIRMED in part; REVERSED in part; and REMANDED for proceedings not inconsistent with this opinion.

U.S. COURT OF APPEALS
F I L E D
FEB 21 1986
GILBERT F. GANUCHEAU
CLERK

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1833

TEXAS STATE TEACHERS ASSOCIATION,
Garland Education Association,
Joe Atkins and Janice Hill,

Plaintiffs-Appellants,

v.

GARLAND INDEPENDENT
SCHOOL DISTRICT, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 12/6/85, 5 Cir., 198__, _____ F.2d ____)

(February 21, 1986)

Before GARZA, JOHNSON and WILLIAMS, Circuit Judges.

PER CURIAM:

☒ The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

☐ The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. S. WILLIAMS
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-6

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
MAR 5 1986
NANCY HALL DOHERTY, CLERK
By _____
Deputy

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1833

D.C. Docket No. CA-3-81-0412-R

TEXAS STATE TEACHERS ASSOCIATION,
Garland Education Association,
Joe Atkins and Janice Hill,
Plaintiffs-Appellants,

v.

GARLAND INDEPENDENT
SCHOOL DISTRICT, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

Before GARZA, JOHNSON, and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bears its own costs on appeal.

December 6, 1985

ISSUED AS MANDATE: March 3, 1986

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By _____
Deputy

New Orleans, Louisiana

U.S. COURT OF APPEALS
FILED
MAR 26 1986
GILBERT F. GANUCHEAU
CLERK

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1833

TEXAS STATE TEACHERS ASSOCIATION,
Garland Education Association,
Joe Atkins and Janice Hill,
Plaintiffs-Appellants,

v.

GARLAND INDEPENDENT
SCHOOL DISTRICT, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

ORDER:

☒ The motion of appellees for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☐ The motion of _____ for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of

the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

☐ The motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ J. S. WILLIAMS
UNITED STATES CIRCUIT JUDGE

U.S. COURT OF APPEALS
FILED
MAY 1, 1986
GILBERT F. GANUCHEAU
CLERK

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1833

TEXAS STATE TEACHERS ASSOCIATION,
Garland Education Association,
Joe Atkins and Janice Hill,
Plaintiffs-Appellants,

v.

GARLAND INDEPENDENT
SCHOOL DISTRICT, et al.,
Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that GARLAND INDEPENDENT SCHOOL DISTRICT, et al., the Defendants-Appellees in this case, hereby appeal to the Supreme Court of the United States from that part of the judgment of the United States Court of Appeals for the Fifth Circuit dated December 6, 1985, which reversed the judgment of the United States District Court for the Northern District of Texas dated August 24, 1984. The Defendants-Appellees' Petition for Rehearing and Suggestion for Rehearing En Banc were denied by order dated February 21, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Respectfully submitted,

/s/ EARL LUNA
LAW OFFICES OF EARL LUNA, P.C.
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 720-2040
Earl Luna
Robert E. Luna
Robert T. Miller, Jr.
Mary Milford

Attorneys for Garland Independent School District, et al.

CERTIFICATE OF SERVICE

I, Earl Luna, counsel of record for Garland Independent School District, et al. and a member of the Bar of the Supreme Court of the United States, hereby, certify that I have served a copy of the Notice of Appeal on all parties required to be served by depositing copies of the Notice of Appeal in the United States mail, on the 30th day of April, 1986, with first-class postage prepaid addressed to the following counsel of record for Texas State Teachers Association, et al. at the address indicated, to wit: Bredhoff & Kaiser, Mr. Robert H. Chanin, Mr. Jeremiah A. Collins, 1000 Connecticut Ave. N.W., Washington, D.C. 20036, and Ms. Karen L. Johnson, Attorney at Law, General Counsel, Texas State Teachers Assoc., 316 West Twelfth Street, Austin, Texas 78701.

/s/ EARL LUNA
Earl Luna
Counsel of Record for Appellants

The Attorney General of Texas
November 27, 1979

Honorable M. L. Brockette
Commissioner of Education
Texas Education Agency
201 East Eleventh Street
Austin, Texas 78701 Opinion No. MW-89

Re: Legality of allowing professional organizations to utilize the "released time" of public school personnel.

Dear Commissioner Brockette:

In 1975 the Fort Worth Independent School District, which participates in the Foundation School Program, adopted a policy that allows certain professional organizations to use school personnel during working hours to pursue the business of the organization. You ask if such a policy is consistent with various constitutional and statutory provisions.

The adopted policy statement reads:

> 'Nine days released time with full pay will be allotted to professional organizations for each 100 members who are in good standing. Such allotments will be in blocks of 100. No allowance will be made for less than 100 in each block. The released time may be used at the discretion of the professional organization for pursuing the business of the organization by its officers or members.
>
> The released time will be based on members in good standing for the school year immediately preceding the school year activating the released time. Professional organizations will include Fort Worth Classroom Teachers Association, American Federation of Teachers, and the Fort Worth Administrators Association.
>
> The roll of members must be filed with the board of education for verification of numbers and employee status.'

You inquire whether the prohibitions of article III, sections 51 and 52 and article XVI, section 6 of the Texas Constitution render this policy unconstitutional. Article III,

section 51 prohibits the grant of public moneys to any individual, association of individuals, or corporation. Section 52 of article III prohibits political subdivisions from granting public money or any thing of value to any individual, association, or corporation. Section 6 of article XVI prohibits appropriations for private or individual purposes unless authorized by the constitution. The Fort Worth Independent School District is covered by these provisions of the constitution. *See Harlingen Ind. School Dist. v. C. H. Page & Bro.*, 48 S.W. 2d 983 (Tex. Comm. App. 1932, jdgmt. adopted); Attorney General Opinions M-1074 (1972), M-950 (1971).

These constitutional provisions prohibit the grant of public funds or benefits to any association unless the transfer serves a public purpose and adequate contractual or other controls ensure its realization. Attorney General Opinion H-1309 (1978). The released time allotted to the professional associations constitutes a benefit financed from public funds. The policy permits teachers to pursue the business of the professional organization while being paid by the school district. In 1978-79, the Classroom Teachers Association used 301 days of released time at an estimated total cost of almost $23,000 in teacher salaries. In addition, the school district was required to pay substitute teachers. Thus, the policy authorizes the transfer of a valuable benefit to the professional association.

In our opinion, the school district has neither articulated a public purpose to be served by the released time program nor placed adequate controls on the use of released time to insure that a public purpose will be served. The time is to be used at the discretion of the professional organization for pursuing its business. In our opinion, this policy grants a substantial benefit to a private professional organization which has no obligation to apply it to accomplish a public purpose. In *Texas Pharmaceutical Association v. Dooley*, 90 S.W. 2d 328 (Tex. Civ. App. — Austin 1936, no writ), the court invalidated an act which unconditionally appropriated public funds to a private professional association, finding it in violation of article III, section 51. *See also* Attorney

General Opinion M-661 (1970) (county may not grant money to charity). We believe the unconditional nature of the grant of services to the professional organization renders the cited policy in violation of article III, sections 50 and 51 and article XVI, section 6. Although the school district may constitutionally pay teachers' expenses at school-related activities such as training or meetings for teachers, *see* Attorney General Opinions H-133 (1973), and C-474 (1965), or adopt certain types of release time programs, it has not specifically tailored the present expenditures to the accomplishment of school-related purposes. Therefore, we conclude that the policy is unconstitutional. In light of our decision in this issue, we need not address your other questions.

SUMMARY

A policy of the Fort Worth Independent School District, which permits teachers to work for professional organizations while being paid salaries by the school district, constitutes an unconditional grant of public funds to a private organization and is therefore unconstitutional.

Very truly yours,

/s/ MARK WHITE
Mark White
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

Prepared by Susan Garrison
Assistant Attorney General

APPROVED: OPINION COMMITTEE

C. Robert Heath, Chairman

Ernest Boardman	Rick Gilpin
David B. Brooks	William G. Reid
Bob Gammage	Bruce Youngblood
Susan Garrison	Lonny Zwiener

Supreme Court, U.S.
FILED
JUL 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1890

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Appellants,

v.

TEXAS STATE TEACHERS ASSOCIATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

---

MOTION TO DISMISS OR AFFIRM

KAREN L. JOHNSON
316 West Twelfth Street
Austin, TX 78701

ROBERT H. CHANIN
JULIA PENNY CLARK
JEREMIAH A. COLLINS *
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340
Attorneys for Appellees

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a public employer violates the First and Fourteenth Amendments when it allows employees to engage in private conversations with each other during non-work periods (such as lunch breaks) but forbids them to discuss employee organizations in those conversations.

2. Whether a public employer violates the First and Fourteenth Amendments when it allows employees the free use of internal message facilities to communicate with each other on personal matters but forbids them to use those facilities for messages about employee organizations.

3. Whether there is a concrete controversy over the prohibition of discussing employee organizations, where employers' officials testified that they understood their rules to forbid such discussions and asked employees to refrain from such discussions.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED	i
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT	5
I. THE APPEAL SHOULD BE DISMISSED FOR LACK OF APPELLATE JURISDICTION	6
II. IN THE ALTERNATIVE, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE SUMMARILY AFFIRMED	8
CONCLUSION	15

TABLE OF AUTHORITIES

Cases: Page

Arnsberg v. United States, 757 F.2d 971 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1183 (1986) 13
Babbitt v. United Farm Workers National Union, 442 U.S. 289 (1979) 13
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 8
Connick v. Myers, 461 U.S. 138 (1983) 13, 14, 15
Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530 (1980) 8, 9
Cornelius v. NAACP Legal Defense & Educational Fund, Inc., —— U.S. ——, 105 S. Ct. 3439 (1985) 9, 10
Dutton v. Evans, 400 U.S. 74 (1970) 7
Houghton v. Foremost Financial Services Corp., 724 F.2d 112 (10th Cir. 1983) 13
Malone v. White Motor Corp., 435 U.S. 497 (1978) .. 7
Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) 15
Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984) 8
National Ass'n of Government Employees v. Campbell, 593 F.2d 1023 (D.C. Cir. 1978) 13
Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931) 15
Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 6, 8, 10
Regan v. Time, Inc., —— U.S. ——, 104 S. Ct. 3262 (1984) 8
Roberts v. United States Jaycees, —— U.S. ——, 104 S. Ct. 3244 (1984) 14
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 6, 7, 8
Staub v. City of Baxley, 355 U.S. 313 (1958) 15
Thomas v. Collins, 323 U.S. 516 (1945) 12
Thornhill v. Alabama, 310 U.S. 88 (1940) 14
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 5, 8, 9
Widmar v. Vincent, 454 U.S. 263 (1981) 10, 11
Wilson v. Cook, 327 U.S. 474 (1946) 7

TABLE OF AUTHORITIES—Continued

Constitution, Statutes and Rules: Page

United States Constitution
First Amendment ..... *passim*
28 U.S.C. § 1254(2) 6, 7
Fed. R. Civ. P. 52(a) 12, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1890

GARLAND INDEPENDENT SCHOOL DISTRICT, *et al.*,
Appellants,

v.

TEXAS STATE TEACHERS ASSOCIATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

---

MOTION TO DISMISS OR AFFIRM

The Texas State Teachers Association, the Garland Education Association, Joe Atkins, and Janice Hill, appellees in this Court, respectfully move for dismissal of the appeal or for affirmance of the decision below. This case does not properly fall within the Court's appellate jurisdiction. Moreover, it is manifest that the court of appeals correctly applied the principles established by decisions of this Court, and the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

COUNTERSTATEMENT OF THE CASE

Texas State Teachers Association (TSTA) is a voluntary membership organization that is affiliated with the National Education Association. The Garland Education Association (GEA) is a local affiliate of TSTA. The purposes of TSTA and GEA include improving the working conditions and wages of school employees, enhancing the professional development of teachers, and improving public support for education. The organizations also engage in a wide range of political activity, supporting legislation and endorsing political candidates that favor the interests of educators. Both organizations have members among the faculty of Garland Independent School District (GISD), including appellee Janice Hill.

The decision that is the subject of this appeal has an extremely narrow focus. Although appellees made a number of claims below, the court of appeals ruled against appellants on only two. Those two claims were based on GISD's action in singling out one topic—employee organizations, such as TSTA and GEA—and prohibiting employees both from discussing that topic during non-work time when they are free to discuss anything else, and from using certain internal message facilities for communications on that topic, even though they are free to use those facilities for any other purpose.

The decision below was based on a record that had been presented in support of cross-motions for summary judgment. Most of that evidence was undisputed, and to the extent that any dispute appeared, the court of appeals concluded that it was not material to appellees' right to judgment on these two issues.

It was undisputed that GISD allowed its employees freely to engage in private conversations during non-work periods, such as breaks and lunchtime. There was only one subject they were forbidden to discuss. GISD officials interpreted GISD Administrative Regulation 412

to prohibit employees during "school hours" (the entire period from 8:00 a.m. to 3:45 p.m.) from discussing any kind of business on behalf of an employee organization, or from "promoting" such an organization. *See* J.S. at 8-10. The deposition testimony of GISD officials also established that many of those officials understood the regulation to forbid all other discussions of employee organizations during school hours. The Superintendent, for example, testified as follows:

> Q. Can four non-elected members of TSTA who happen to be teachers and who happen to be taking a 10-minute coffee break in your teachers' lounge or work room—can they legitimately discuss next month's TSTA seminar in Austin?
>
> A. We ask our staff members [to] refrain from discussing professional organizations and associations during the course of the school day.
>
> Q. From 8:00 to 3:45?
>
> A. 8:00 to 3:45.
>
> Q. So it would be technical violation?
>
> A. Yes.

J.S. App. at B-15. The Assistant Superintendent testified:

> Q. Can you tell me whether the district has a policy or practice which prohibits teachers from discussing teacher employee organization matters between the hours of 8:00 and 3:45 on school days?
>
> A. Yes, we do.
>
> Q. Does it matter what the content of the conversation is or where on campus it occurs?
>
> A. No, it doesn't.
>
> Q. Are two teachers—does it matter whether they are members or nonmembers of an organization?
>
> A. No.

Q. If two teachers then are walking down the hall going to lunch and they start chatting about an upcoming TSTA seminar in Austin, is this a violation of that policy?

A. Technically it would be.

Id. at B-14. Several principals were uncertain about the exact sweep of the rule,[1] but one principal testified that to "be safe" a teacher should not discuss anything having to do with an employee organization, "whether it's recruitment or whether it's a TSTA sponsored classroom technique workshop." [2]

In regard to the actual enforcement of this rule, the testimony was that school officials made no active effort to monitor teachers' private conversations. At the same time, there was no evidence that the officials would refrain from enforcing the rule if they overheard a conversation about an employee organization or if such a conversation were reported to them. J.S. App. at B-17.

It was also undisputed that GISD allowed teachers the free use of some internal mail facilities and certain bulletin boards. Teachers were allowed to use these facilities even for purely private purposes. There was only one exception: all messages or materials pertaining to employee organizations were excluded.

---

[1] For example, Principal Collins testified that teachers may discuss employee organizations unless it is an "act of promotion," but he stated that the rule would be violated merely by a discussion of the agenda of an upcoming TSTA meeting (Rec. N., p. 22). Principal White testified that it would be impermissible to mention a teacher organization "in a tone of promotion" (Rec. K, pp. 36-38), meaning that the rule would allow "casually mentioning a professional organization but not talking about a professional organization" (*id.*, p. 35).

[2] Rec. J. (Richey), pp. 54-55. *See also* Rec. H. (Nix), pp. 42-43 (policy does not permit teachers "to say or write anything regarding their teacher organizations" in teachers' workroom or anywhere else on campus).

The district court granted GISD's motion for summary judgment on these issues. J.S. App. at A-17-19. The court of appeals reversed in part, holding that the First Amendment was violated by GISD's application of Administrative Regulation 412 to make employee organizations a forbidden topic in private conversations on non-work time and in the use of those internal communication facilities that were otherwise available for individual employees' use. The ground for both of these holdings was that school officials could not draw such distinctions based on the content of speech where that speech did not "materially or substantially interfere[] with the activities or discipline of the school." J.S. App. at B-14, quoting from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508-09 (1969); J.S. App. at B-18.

ARGUMENT

The questions presented in this case are very narrow. The judgment below does not involve any challenge to a public employer's right to limit the times and places in which employees may talk about topics other than their work. It does not involve any challenge to a public employer's right, if it chooses, to reserve its internal message facilities for official communications and to preclude employees from using them for private reasons. Nor does it involve any issue of whether an employer must give organizations or other "outsiders" access to the workplace or to the employer's internal message facilities in order to communicate with employees. The only question raised by the judgment below is whether an employer that allows its employees to speak freely among themselves on non-work time, and to use the employer's internal message facilities for personal communications with other employees, may discriminatorily carve out one subject area on which all such conversations and communications are forbidden. The court of appeals held that by doing so, GISD had violated the well-established rule that

the First Amendment prohibits discrimination among speech on the basis of its content. This ruling is correct and is based on principles firmly established by this Court. There is no conflict among the circuits. It is therefore manifest that the questions on which the decision depends are so insubstantial as not to need further argument. The judgment below should be summarily affirmed.

Because the merits of the case are so clear, it is tempting to omit any argument on appellate jurisdiction, which is admittedly a closer question. However, because the form of this Court's disposition of the case depends upon the existence or nonexistence of appellate jurisdiction, we include a motion to dismiss the appeal as well as a motion to affirm the judgment below. As logic dictates, we address the question of jurisdiction first, and show that based upon principles established by the Court, the appeal should be dismissed for lack of appellate jurisdiction.

I. THE APPEAL SHOULD BE DISMISSED FOR LACK OF APPELLATE JURISDICTION.

This case does not fall within the appellate jurisdiction granted by 28 U.S.C. § 1254(2). That section provides for jurisdiction by appeal only when a party is "relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ." It is true, as appellant argues, J.S. at 4, that this Court has held that "legislative action" promulgated by a local administrative body such as a school board may be treated as a "State statute" for purposes of section 1254(2). *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 42-43 (1983). But jurisdiction under section 1254(2) does not exist merely because such a "statute" is somehow involved in a case. Appellate jurisdiction exists only in "cases in which a state statute is expressly struck down on constitutional grounds and [not in] those in which an exercise of authority under state law is invalidated without reference

to the state statute." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984). *See also, e.g., Wilson v. Cook*, 327 U.S. 474, 482 (1946).

To be sure, this Court has allowed appeals where a state statute was not declared invalid on its face but was held to be unconstitutional as applied to certain circumstances. *E.g., Malone v. White Motor Corp.*, 435 U.S. 497, 499 (1978); *Dutton v. Evans*, 400 U.S. 74, 76 n.6 (1970) (plurality opinion). And the court of appeals in this case stated that it held "the application of the Regulation to these activities unconstitutional." J.S. App. at B-19. Nonetheless, the circumstances of this case place it in the category identified in *Silkwood* in which no appeal lies: the category of cases in which all that has been struck down is an "exercise of authority" under the state statute, rather than the statute itself.

The effect of the court of appeals decision in this case is not to hold the GISD regulation invalid. Its effect is merely to hold that school officials may not rely on that regulation to forbid communications on the subject of employee organizations in those settings where employees are freely allowed to communicate on all other subjects. The issue in this case is no different from what it would have been if no school regulation had been involved, but instead merely a school practice of forbidding employees to communicate on the subject of employee organizations. Indeed, on its face the regulation does not purport to discriminate against speech on the subject of employee organizations in employees' private conversations or in employees' use of school message facilities for private purposes. *See* J.S. at 5-6. The judgment of the court of appeals thus leaves the regulation in force according to its terms.

For these reasons, section 1254(2) would be stretched far beyond its original intent if it were applied here. Federal courts may declare a wide variety of state actions

unconstitutional, but Congress did not provide for appeal to this Court in all such cases. Congress confined the right of appeal to cases in which a state legislative enactment is held invalid. The Court has repeatedly "emphasized that statutes authorizing appeals are to be strictly construed." *Perry Education Ass'n, supra,* 460 U.S. at 43; *Silkwood, supra,* 464 U.S. at 247. That principle would be violated if a right of appeal were recognized in this case.

II. IN THE ALTERNATIVE, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE SUMMARILY AFFIRMED.

A. The judgment below rests solidly on a fundamental proposition of First Amendment law. To begin with, the First Amendment guarantees to teachers and other public employees the "rights to express their views and to associate with others for communicative purposes." *Minnesota State Board for Community Colleges v. Knight,* 465 U.S. 271, 287 (1984); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506 (1969). The appellees in this case are thus protected by the fundamental proposition that the First Amendment forbids discrimination based on the content of speech except "in the most extraordinary circumstances." *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 65 (1983). *See also Regan v. Time, Inc.,* —— U.S. ——, 104 S.Ct. 3262, 3267 (1984). The First Amendment's hostility to content-based discrimination not only forbids efforts to curtail expressions of a particular viewpoint, but also forbids efforts to restrain discussion "of an entire topic." *Consolidated Edison Co. v. Public Service Comm'n of New York,* 447 U.S. 530, 537 (1980).

This basic principle, without more, requires affirmance of the judgment below. Having allowed employees to conduct private conversations during non-work periods, GISD cannot discriminate on the basis of content and ban discussions on the subject of employee organizations. The

only "extraordinary circumstances" that could justify such discrimination would be a showing that conversations on this subject during non-work periods would disrupt or interfere with the operation of the schools. *See Consolidated Edison Co., supra*, 447 U.S. at 539; *Tinker, supra*, 393 U.S. at 508-509. Appellant makes no such showing here.[3] Similarly, having allowed employees the privilege of using teacher mailboxes and certain bulletin boards for personal messages, GISD cannot discriminate on the basis of content and ban messages on the subject of employee organizations. Again, GISD has made no showing of disruption or interference that would justify this content-based discrimination.

B. Appellant invokes the concept of the "public forum" to justify its content-based discrimination in employees' use of internal message facilities. But that argument misconceives the "public forum" decisions of this Court. Even if "public forum" analysis is appropriate in this case, GISD's content-based discrimination is prohibited.

When use of public property is at issue, "the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, —— U.S. ——, 105 S. Ct. 3439, 3448 (1985). Under

---

[3] Appellant argues that allowing teachers, in private conversations on non-work time, to "promot[e] an employee organization" or "perform employee organization business," would amount to a violation of the Texas Constitution, which forbids a grant of public funds to a private organization. J.S. at 18. The court of appeals correctly held, however, that allowing private conversations about employee organizations on non-work time would not constitute a grant of funds to those organizations "any more than to allow teachers to speak favorably of a political party, a church, a club, or a football team during the lunch hour constitutes an unlawful grant of public funds to such an organization." J.S. App. at B-16.

that analysis, property may be a traditional public forum (*e.g.*, public streets and parks, *see id.* at 3449), or a limited or "designated" public forum, open only to certain persons or for certain purposes (*e.g.*, public school board meetings or a city-owned theater, *see id.* at 3450). If the government, however, has not opened the property for any such use, or if the nature of the property is inconsistent with such a use, there is no public forum at all. *Id.* at 3450. In either a traditional public forum, or in a limited or "designated" public forum within the scope of its designation, the government may not enforce a content-based exclusion unless that exclusion "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Perry Education Association*, *supra*, 460 U.S. at 45, 46. But if the property is not a public forum at all, the government may justify a content-based exclusion on a mere showing that the exclusion is reasonable and not an attempt to restrict the expression of a particular viewpoint. *Id.* at 46.

Appellant argues that because GISD's internal mailboxes and bulletin boards are not a public forum for persons or organizations *outside* the schools, it can validly impose content-based restrictions on their use by personnel *within* the schools, based solely on a showing of reasonableness. J.S. at 11-13. That argument ignores the middle ground of the public forum analysis: the limited or "designated" forum open only to use by certain groups. The Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), establishes that the internal message facilities open for teachers' personal use in GISD are just such a "designated" forum.

In *Widmar*, the University of Missouri at Kansas City made its facilities available generally for the activities of registered student groups, with one exception: it excluded any group whose activities consisted of "religious worship or religious teaching." *Id.* at 265. The Court held that this exclusion violated the First Amendment. The uni-

versity had "created a forum generally open for use by student groups." *Id.* at 267. Having done so, it could not discriminate based on the content of a student group's speech unless that discrimination was "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Id.* at 270.

This case is an exact parallel. It is undisputed that GISD allows its employees full use of certain internal message facilities—including teacher mailboxes and at least some bulletin boards—for any and all purposes, including purely private communications, with only one exception. That exception discriminates on the basis of content: it excludes all communications regarding employee organizations. As in *Widmar*, it is irrelevant that outsiders have no right of access to these facilities. Having opened the facilities for general use by employees, GISD cannot discriminate among various employees who would use those facilities based on the content of their messages. As in *Widmar*, that discrimination could be sustained only if it were narrowly tailored and necessary to serve a compelling interest.

Appellant here has fallen far short of showing such a compelling justification of its content-based discrimination. For justification, it relies on a state statute that prohibits any school district or school administrator from requiring or coercing teachers to join an employee organization. J.S. at 12. It is readily apparent, however, that a total ban on all communications about employee organizations is not "narrowly tailored" to avoid such coercion.

C. Appellant argues, on the issue of employee conversations during non-work time, that the court of appeals impermissibly substituted its own interpretation of the regulation for that of GISD's officials, and that its judgment was based on this improper interpretation. This argument is wrong on two grounds.

First, appellant concedes that GISD officially understood its regulation to prohibit all employees, even those

who were not elected officials of an organization, from "promoting" the organization or discussing any type of "business on behalf of the organization." J.S. at 8-10. The court of appeals correctly found that this prohibition alone would violate the First Amendment. J.S. App. at B-15-16. The right to discuss the advantages of joining an employee organization and to urge others to join is protected not only as part of free speech but also as part of the right of free association. *Thomas v. Collins*, 323 U.S. 516, 532-43, 537 (1945).[4]

Second, there was abundant evidence in the form of school officials' testimony—including testimony of the superintendent himself—that some officials understood *all* discussion of employee organizations to be prohibited. *See* pages 3-4, *supra;* J.S. App. at B-14-15 & n.9. The superintendent expressly testified: "We ask our staff members [to] refrain from discussing professional organizations and associations during the course of the school day." *See* J.S. App. at B-15 n.9. On that record, the court of appeals was entitled to conclude that there was no genuine dispute of fact about GISD's threatened prohibition of such discussions and to conclude that appellees were entitled to judgment as a matter of law.[5]

---

[4] Moreover, even if mere discussion of the organization were protected speech while "promoting" it was not, any regulation attempting to draw that line would be unconstitutionally vague.

> [T]he supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Thomas v. Collins, supra, 323 U.S. at 535-36. This danger is vividly illustrated by the testimony of one principal that "to be safe" an employee should avoid all discussion of employee organizations. *See* page 4 & n.3, *supra.*

[5] Appellants are wrong in arguing (J.S. at 9 n.6) that the court of appeals was bound, on review of an order granting summary judgment, by the "clearly erroneous" standards of Fed. R. Civ. P.

This dispute was not abstract or hypothetical.[6] Although school officials testified that they had no active program for monitoring employee conversations to detect violations, there was no evidence that they would not enforce their rules if a violation came to their attention. J.S. App. at B-17. Moreover, they "ask[ed]" and "expect[ed]" employees to refrain from conversations about employee organizations. *Id.* at B-15, B-17. The only way an employee could "be safe" was to refrain altogether from talking about employee organizations from 8:00 a.m. to 3:45 p.m. Page 4, *supra*. These facts were sufficient to create a genuine threat of enforcement and to support the court of appeals' conclusion that this was a concrete controversy. In virtually identical circumstances the Court found a concrete controversy in *Babbit v. United Farm Workers National Union*, 442 U.S. 289, 298, 301-02 (1979).

D. Finally, contrary to appellants' argument, this case is not controlled by *Connick v. Myers*, 461 U.S. 138 (1983). First, *Connick* does not allow public employers to ban employee speech on questions of public concern. *Id.* at 144-46. A large proportion of speech pertaining to employee organizations is speech on matters of public concern. The business of TSTA and GEA includes lobbying and politics, and efforts to improve the quality of

---

52(a). That rule applies only when there has been a trial of the facts. *Id.* The filing of cross-motions for summary judgment does not convert a summary judgment proceeding into "a trial on stipulated facts," or give the district court authority to "resolve[] fact issues and ma[k]e findings thereon" (J.S. at 9 n.6). *See, e.g., Arnsberg v. United States*, 757 F.2d 971, 975 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1183 (1986); *Houghton v. Foremost Financial Services Corp.*, 724 F.2d 112, 114 (10th Cir. 1983); *National Ass'n of Government Employees v. Campbell*, 593 F.2d 1023, 1026-27 (D.C. Cir. 1978).

[6] Appellant does not contend that the dispute over using internal message facilities was abstract, but concedes that such privileges had specifically been denied to appellee Janice Hill, who is a teacher at GISD. J.S. at 8.

public education and to increase public support for education. Indeed, because in Texas (and many other states) public employee organizations are forbidden to engage in collective bargaining, virtually all of their activities on behalf of members take place in the political arena. *Connick* recognized that matters in the political arena are of public concern and that speech on these matters, as political speech, is at the core of the values protected by the First Amendment. *Id.* at 145. *Connick* also expressly acknowledged that the decisions protecting public employees' First Amendment rights were originally based upon the principle of freedom to join in associations and thereby "to participate in public affairs." *Id.* at 144-45. *See also Roberts v. United States Jaycees*, —— U.S. ——, 104 S. Ct. 3244, 3252 (1984). It follows that public employers under *Connick* may not do as GISD did and adopt a ban on all speech about employee organizations at times and in places where employees are otherwise free to speak.[7]

Second, to the extent that some speech on employee organizations may not address matters of public concern, the opinion in *Connick* emphasized that it does not hold speech on matters of private concern to be unprotected. 461 U.S. at 147. Instead it recognized that public agencies must have flexibility to respond to incidents of such speech, without having every case of employee discipline converted into a constitutional issue. *Id.* at 146-47. These principles, and the concerns that activate them, do not authorize public employers to adopt a content-based policy of prior restraint against speech on subjects that are deemed to be of only private concern. The reasons that content-based prior restraints are prohibited in other settings are equally applicable in the context of public employment. Prior restraints sweep together protected speech that cannot legitimately be the subject of prohibition and unprotected speech that validly can be prohibited.

---

[7] See also *Thornhill v. Alabama*, 310 U.S. 88, 102-03 (1940) (labor relations in general are matters of public concern).

The premise of the First Amendment is that—with only a few extraordinary exceptions—government must allow the speech, subject to the right of imposing "[s]ubsequent punishment for such abuses as may exist . . . consistent with constitutional privilege." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720 (1931). *See also id.* at 713-19; *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 584 n.6 (1983).[8]

Connick does not alter the rule forbidding prior restraints. It gives public agencies the right, after the fact, to discipline employees whose speech on matters of private concern is thought to harm employer interests. It does not give such employers the right to impose a prior restraint against all speech on certain subjects, at times and under conditions where employees are otherwise free to engage in private conversations.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed for lack of jurisdiction or the judgment below should be summarily affirmed.

Respectfully submitted,

KAREN L. JOHNSON
316 West Twelfth Street
Austin, TX 78701

ROBERT H. CHANIN
JULIA PENNY CLARK
JEREMIAH A. COLLINS *
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340
Attorneys for Appellees

* Counsel of Record

---

[8] This rule forbidding prior restraints applies to oral as well as written speech, and has been applied specifically to speech for the purpose of urging others to join employee organizations. *See, e.g., Staub v. City of Baxley*, 355 U.S. 313 (1958).

Supreme Court, U.S.
FILED
SEP 23 198
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1890

In The

Supreme Court of the United States

OCTOBER TERM, 1985

GARLAND INDEPENDENT SCHOOL DISTRICT, et al.,
Appellants,

v.

TEXAS STATE TEACHERS ASSOCIATION, et al.,
Appellees.

On Appeal From the United States Court of Appeals for the Fifth Circuit

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

LAW OFFICES OF EARL LUNA, P.C.
EARL LUNA, Counsel of Record
ROBERT E. LUNA
MARY MILFORD
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 720-2040

ATTORNEYS FOR APPELLANTS

QUESTIONS PRESENTED

1. Whether a school district regulation which prohibits teachers, acting on behalf of an employee organization,* from using the teacher mailboxes and bulletin boards for recruiting members or conducting business on behalf of the employee organization violates the First Amendment to the Constitution of the United States.

2. Whether a school district regulation which prohibits teachers, acting on behalf of an employee organization,* from recruiting members or conducting business on behalf of the employee organization on school premises during school hours violates the First Amendment to the Constitution of the United States.

3. Whether a school district regulation may be held unconstitutional, as applied, on the basis of how it could conceivably be interpreted and applied, but is not being so interpreted or applied by the school district.

*Employee organizations are those whose main purpose is to represent a group of employees on matters of employment practices and procedures.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
INDEX OF AUTHORITIES	iii
BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM	1
I. THIS COURT HAS APPELLATE JURISDICTION OF THIS CASE	2
II. APPELLEES' COUNTERSTATEMENT OF THE QUESTIONS DISTORTS THE ISSUES IN THIS CASE	3
III. THE COURT OF APPEALS APPLIED THE WRONG STANDARD OF REVIEW	5
IV. THE ISSUES DECIDED BY THE COURT OF APPEALS REGARDING TEACHER CONVERSATIONS WERE ABSTRACT AND HYPOTHETICAL	6
PRAYER	8
CERTIFICATE OF SERVICE	9

INDEX OF AUTHORITIES

	Page
Allen vs. United Mine Workers of America 1979 Benefit Plan and Trust, 726 F.2d 352 (7th Cir. 1984)	6
Anderson vs. Liberty Lobby, Inc., ____ U.S. ____, 106 S.Ct. 2505 (1986)	
Burger King Corp. vs. Rudzewicz, ____ U.S. ____, 105 S.Ct. 2174 (1985)	3
John vs. State of Louisiana (Board of Trustees for State Colleges and Universities, et al)., 757 F.2d 698 (5th Cir. 1985)	6
Kremens vs. Bartley, 431 U.S. 119, 97 S.Ct. 1709 (1977)	7
O'Shea vs. Littleton, 414 U.S. 488, 94 S.Ct. 669 (1974)	7
Perry Education Association vs. Perry Local Educators' Association, 460 U.S. 37, 103 S.Ct. 948 (1983)	passim
Silkwood vs. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615 (1984)	2, 3
Younger vs. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971)	7
STATUTES	
28 U.S.C. §1254 (2)	1, 2
RULES	
Rule 52(a) Federal Rules of Civil Procedure	6
REGULATIONS AND POLICIES	
Garland Independent School District Administrative Regulation 412	passim

No. 85-1890

In The

Supreme Court of the United States

OCTOBER TERM, 1985

GARLAND INDEPENDENT SCHOOL DISTRICT, et al.,
Appellants,

v.

TEXAS STATE TEACHERS ASSOCIATION, et al.,
Appellees.

On Appeal From the United States Court of Appeals for the Fifth Circuit

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellants would respectfully submit that this case does come within the scope of appellate review conferred on this Court by 28 U.S.C. §1254(2) and, therefore, should not be dismissed for lack of jurisdiction. That part of the Court of Appeals' decision which is presented in this appeal should be summarily overruled, not affirmed, since this case is controlled by this Court's decision in *Perry Education Association vs. Perry Local Educators' Association,* 460 U.S. 37, 103 S.Ct. 948 (1983), which the Court of Appeals circumvented and ignored in reaching its decision.

I. THIS COURT HAS APPELLATE JURISDICTION IN THIS CASE

Appellees' contention that all the Court of Appeals struck down in this case was an exercise of authority under a state statute, rather than a state statute itself, is directly refuted by the very decision Appellees rely on of *Silkwood vs. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615 (1984).

The *Silkwood, supra,* decision involved an award of punitive damages allowed pursuant to a state statute. The award was set aside because of the preemptive effect of federal law regulating nuclear plants. The decision was reviewed by certiorari since this Court found that the case was not appealable under 28 U.S.C. §1254(2) because:

> It [the Court of Appeals] did not purport to rule on the constitutionality of the Oklahoma punitive damages statute. The court did not mention the statute, and the parties did not contest or defend the constitutionality of the statute in their appellate briefs. While the award itself was struck down, the statute authorizing such award was left untouched.

Silkwood, supra, ____ U.S. at ____, 104 S.Ct. at 621.

In the case at bar, unlike *Silkwood,* the constitutionality of the Garland Independent School District's Administrative Regulation 412 has been under attack since the very inception of this suit starting with the Original Complaint. The District Court ruled in favor of the constitutionality of the Regulation, both as written and applied. The constitutionality of the Regulation was raised and thoroughly briefed by both sides at the Court of Appeals which upheld its application to outside employee organization representatives but struck down as unconstitutional the Regulation's application to teachers acting on behalf of the employee organizations. Constitutionality of a statute was never an issue in *Silkwood,* while in this case it has been the only issue.

Administrative Regulation 412 was a "unilateral promulgation of a rule with continuing legal effect". *Perry Education Assn., supra,* 460 U.S. at 42, 103 S.Ct. at 953. It decreed that "the school mail service shall not be used by an employee organization" and prohibited the distribution of employee organization material directly in mailboxes at the school. (J.S. p. 6). In order to effectuate and enforce this regulation it was necessary to apply it not only to off-campus TSTA-NEA and other employee organization representatives but to TSTA-NEA members who are teachers as well. The later application was held unconstitutional. Therefore, even though the Court of Appeals did not find the language of the regulation to be facially unconstitutional, it struck down the manner of enforcement of the regulation. The Garland Independent School District can no longer prohibit the distribution of employee organization material directly into the mailboxes because it may not apply the prohibition to a teacher even though the teacher is distributing TSTA-NEA or other union material. The Court of Appeals limited the scope of the applicability of the regulation to such a degree that the regulation is unenforceable. So long as it is clear that the Court of Appeals ruled on the regulation itself, it is immaterial for purposes of appeal, whether the regulation as written was held unconstitutional or whether the unconstitutionality arose from its application in the case at bar. *Burger King Corp vs. Rudzewicz,* ___ U.S. ___, 105 S.Ct. 2174, 2181 (1985).

II. APPELLEES' COUNTERSTATEMENT OF THE QUESTIONS DISTORTS THE ISSUES IN THIS CASE

Appellants are not before this Court for a determination, as Appellees' questions suggest, of whether a teacher may make a mention of an employee organization in a personal

note to another teacher which is placed in the mailbox. Appellants are before this Court seeking a determination of whether a school district may constitutionally restrict use of its mail facilities and prohibit access by all employee organizations to such facilities and whether it may enforce this regulation by prohibiting an off-campus organization representative or a teacher, who may also be an employee organization representative, from placing employee organization materials in the mailboxes. The only factual controversy on this issue which was presented to the district court involved a request by Appellee Hill, who was a teacher and an officer of an employee organization, to place TSTA notices and information in the mailboxes. Appellant Garland Independent School District refused the request pursuant to Administrative Regulation 412. (Rec. B, pp. 10, 11 - Hill). The District Court found that the mail system, bulletin boards and public address system were for the distribution of official messages between administrators and teachers and the Fifth Circuit agreed. (Rec. L, p. 28 - White); (Rec. pp. 383, 389, App. A-10, 16, B-18). But, since teachers also used the mail system for personal messages on occasion, the Fifth Circuit held that the Regulation could not be applied to the teachers when the teacher was distributing employee organization material. The logic would appear to be that an official employee organization document can be kept out of the mail system if the person requesting distribution is not a teacher — but, if a teacher wishes to distribute that *same document*, it somehow becomes a personal message from teacher to teacher rather than a communication from the employee organization to the teachers. This totally defeats the *Perry* holding.

Likewise, this appeal involves the question of the school districts' right to curtail employee organization activities during school hours. The issue presented for review is not

the private conversations of the teachers, rather it is the teachers' representation of the employee organization and overt activities to carry out this representation during school hours. The subject matter of employee organization business does not change character based on who is making the presentation. Employee organization business does not become private and personal conversation when stated by a teacher representative rather than by an outside employee organization representation.

III. THE COURT OF APPEALS APPLIED THE WRONG STANDARD OF REVIEW.

This case changed character when the Fifth Circuit focused its attention on all the *possibilities* presented by the Regulation instead of on the actual controversy presented for decision.

The Court of Appeals focused heavily on its own review and resolution of fact issues regarding how the district would or could interpret the regulation under attack. The resolution of these fact issues, both by the District Court and by the Court of Appeals, gives rise to a unique and crucial problem regarding the standard of review to be applied by the Court of Appeals in this case. Even though the case was submitted on cross-motions for summary judgment, there is no question that fact issues were involved and decided. The District Court made a factual determination regarding how the school district interpreted and applied the Regulation and specifically found that the Regulation *was not* applied to private teacher conversations. (A-6, n. 13). This fact issue was genuine and obviously material since it formed the basis for the Court of Appeals' decision which, after reviewing the same evidence, reversed the District Court's decision because it disagreed with this finding. (B-15).

Since a fact issue was decided by the District Court, this case falls within the exception to the general rule for the standard of review in a summary judgment case, and instead, review is governed by the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. The clearly erroneous standard of review may be applicable to a judgment which on its face purports to be a summary judgment. When the trial court with the parties' acquiescence treats the hearing on cross-motions for summary judgment as a trial on a stipulated written record and resolves fact issues, its findings can only be overturned on appeal if they are clearly erroneous. *John vs. State of Louisiana (Board of Trustees for State Colleges and Universities, et al).*, 757 F.2d 698, 703 (5th Cir. 1985). *Allen vs. United Mine Workers of America 1979 Benefit Plan & Trust*, 726 F.2d 352 (7th Cir. 1984).

IV. THE ISSUES DECIDED BY THE COURT OF APPEALS REGARDING TEACHER CONVERSATIONS WERE ABSTRACT AND HYPOTHETICAL

The factual issues giving rise to the controversy involved attempted visits by the employee organization representatives to the campus during school hours and denial of permission for Janice Hill, a teacher and TSTA officer, to place TSTA materials in the mailboxes. There wasn't any other factual controversy before the Court. The decision of the Fifth Circuit regarding the teachers' conversations was based entirely on a non-existent controversy and a series of abstract and hypothetical "what ifs". Appellees do not refute the lack of a factual controversy, rather they argue that there was a genuine "threat of enforcement" of the Regulation against teachers regarding their private conversations which was sufficient to provide the requisite case or

controversy. (Motion to Dismiss or Affirm, p. 13). This argument surfaces for the first time at the Supreme Court level. It was not plead, nor was it argued on the motion for summary judgment. Plaintiff Hill's deposition does not reflect any fear, or even any perception, that the Regulation would be enforced against her for casual conversation. There is no testimony from any other teacher that perceived a "threat of enforcement".

A Plaintiff who challenges a state statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. *O'Shea vs. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 675 (1974). Persons with fears which are "imaginary or speculative" are not appropriate Plaintiffs. *Younger vs. Harris,* 401 U.S. 37, 42, 91 S.Ct. 746, 749 (1971).

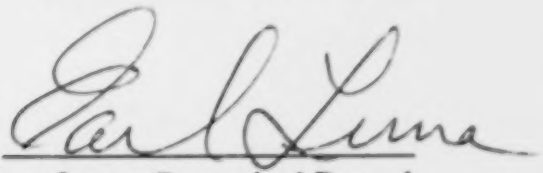
Furthermore, the Court of Appeals could also only *speculate* on the threat of enforcement — "officials *might be inclined* to enforce these policies" (emphasis added) (B-16), yet it rendered a constitutional decision on this speculation, ignoring the long-standing doctrine of deciding constitutional issues only when necessary and limited to the narrow fact issue actually presented. *Kremens vs. Bartley,* 431 U.S. 119, 97 S.Ct. 1709 (1977).

CONCLUSION

For these reasons, this Court should deny Appellees Motion to Dismiss or Affirm, should note probable jurisdiction of this appeal and summarily reverse that part of the Fifth Circuit's decision which reversed the District Court's judgment, or in the alternative this appeal should be accorded plenary review.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.

By: 

EARL LUNA, Counsel of Record
ROBERT E. LUNA
MARY MILFORD
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 720-2040

ATTORNEYS FOR APPELLANTS
GARLAND INDEPENDENT
SCHOOL DISTRICT, et al.

CERTIFICATE OF SERVICE

I, Earl Luna, counsel of record for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of the Brief Opposing Motion to Dismiss or Affirm on all parties required to be served, by depositing three copies of the Brief Opposing Motion to Dismiss or Affirm in the United States mail, on the 22nd day of September, 1986, with first-class postage prepaid, addressed to the following counsel of record for Appellees at the address indicated, to-wit: Bredhoff & Kaiser, Mr. Robert H. Chanin, Ms. Julia Penny Clark, Mr. Jeremiah A. Collins, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036, and Ms. Karen L. Johnson, Attorney at Law, General Counsel, Texas State Teachers Association, 316 West Twelfth Street, Austin, Texas 78701.

Earl Luna

EARL LUNA
Counsel of Record for Appellant